Supreme Court, U. S.
FILED
APR 14 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1421

DENNIS G. MARTIN, Administrator of the Estate of HARRY EUGENE WALKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to Review the Judgment and Opinion of the United States Circuit Court of Appeals for the Ninth Circuit Entered December 3, 1976.

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No. .....

DENNIS G. MARTIN, Administrator of the Estate of HARRY EUGENE WALKER,

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to Review the Judgment and Opinion of the United States Circuit Court of Appeals for the Ninth Circuit Entered December 3, 1976.

Petitioner Dennis G. Martin, Administrator of the Estate of Harry Eugene Walker, Deceased, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered December 3, 1976.

Opinions Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is not reported yet. A copy of the opinion is set out in the Appendix at A-1. The Decision and Judgment of the United States District Court for the Central District of California is reported

at 392 F.Supp. 243; a copy of the decision, findings of fact, and conclusions of law, and judgment, is set out in the Appendix at A-13.

Jurisdiction.

Jurisdiction of the District Court in this case is based on the Federal Tort Claims Act, 28 U.S.C. §1346(b) and 28 U.S.C. §2671 and §2674.

The judgment of the Court of Appeals was entered December 3, 1976. Petition for rehearing was timely filed on December 17, 1976, and was denied January 14, 1977. This petition was filed within ninety (90) days of that date.

Questions Presented for Review.

This case presents squarely to this Court the conflict in federal cases inherent between the interpretation of *Dalehite* [*Dalehite v. U.S.*, 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953)], followed by the Ninth Circuit Court of Appeals below, exempting both policy decision and execution thereof from Federal Tort Claims liability, and *Dalehite* as interpreted by *Indian Towing* [*Indian Towing Co. v. U.S.*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed.2d 48 (1955)], the trial court below [Appendix A-13], *Cameron Smith* [*Smith v. United States*, 546 F.2d 872, 877], a contemporaneous decision involving the same national park, and other federal cases, particularly from the Fifth Circuit, limiting the "discretionary exemption" of the Federal Tort Claims Act to policy decision alone. It also presents for review government's growing efforts to escape liability for its negligence by taking refuge in state statutes designed to protect private landowners from trespassers. This case also involves an issue of

judicial economy. Should a Court of Appeals decision which circumvents Rule 52 be allowed to stand where the facts adduced at trial amply support the trial court's findings? Will not circumvention of Rule 52 lead to the proliferation of factual appeals?

The foregoing policy questions are raised in the following six specific questions for review:

1. Whether the "discretionary exemption" of the Federal Tort Claims Act, 28 U.S.C. §2680(a), extends to shield the defendant United States from liability for death of a visitor who was killed at Old Faithful by a grizzly bear, where the trial court found the death was due to negligence by the agency employees in transplanting the bear, previously trapped, an unsafe distance away; to the employees' carelessness and malfeasance in failure to carry out proper operational procedures for the protection of visitors threatened by grizzlies dispersed to visitor areas by the abrupt closing of back-country dumps; and to failure of agency employees to warn decedent and other visitors of extreme and unusual dangers from hungry grizzlies so dispersed?

2. Whether this case, in the Ninth Circuit, and the *Cameron Smith* case [*Smith v. United States*, 546 F.2d 872], in the Tenth Circuit, both decided in December, 1976, are in direct conflict on the "discretionary exemption" issue, and if so, whether the conflict between these two cases, representing the divergent interpretations of 28 U.S.C. §2680(a), should be resolved?

3. Whether the Circuit Court of Appeals for the Ninth Circuit, by holding that the fully supported findings of fact of the trial court were "clearly erroneous,"

sets precedent whereby Rule 52, Fed. R. Civ. P., is in effect vitiated, and appellate "retrial" made of facts proved, examined, cross-examined, and evaluated once and at length and in depth, by the trial court?

4. Whether the National Park Service can be held to a different and lower standard of care towards a park visitor who was allowed to enter Yellowstone Park without payment of a fee than a visitor from whom a fee was collected?

5. Whether a duty to warn and a duty to use due care are basic minimum requirements made of the National Park Service and the government in all nationally operated areas where the public is invited?

6. Whether the Court of Appeals herein should be reversed and the findings and judgment of the trial court in favor of plaintiff should be reinstated?

Statutes, Ordinances, and Regulations Involved.

The federal statutes whose applications are involved are the Federal Tort Claims Act, 28 U.S.C. §1346(b), as follows:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the

> United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2680, the "discretionary exemption" to the Federal Tort Claims Act, as follows:

> § 2680. *Exceptions*
>
> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

16 U.S.C. § 1a-1, providing the Congressional declaration of the purposes of Yellowstone and other national parks as follows; and § 1a-2, to provide for advisory committees to the National Park Service.

> § 1a-1. *National Park system: administration; declaration of findings and purpose*
>
> Congress declares that the national park system, which began with establishment of Yellowstone National Park in 1872, has since grown to include superlative natural, historic, and recreation areas in every major region of the United States, its territories and island possession; that these areas, though distinct in character, are united through their inter-related purposes and resources into one national park system as cumulative ex-

pressions of a single national heritage; that, individually and collectively, these areas derive increased national dignity and recognition of their superb environmental quality through their inclusion jointly with each other in one national park system preserved and managed for the benefit and inspiration of all the people of the United States; and that it is the purpose of this Act to include all such areas in the System and to clarify the authorities applicable to the system.

The Wyoming statute involved is Wyoming Statutes, 1975 Cumulative Supplement, Chapter 21.1, Liability of Owners of Land Used for Recreation Purposes, § 34-389.1-34-389.6 [Appendix A-34].

The Federal Rule involved is Rule 52. (Federal Rules of Civil Procedure):

Findings by the Court.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered

as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Statement of the Case.

Harry Eugene Walker was killed and partly eaten by a grizzly bear in the fringe areas of Old Faithful visitor center in Yellowstone National Park the night of June 24-25, 1972. [(Ranger) Williamson Deposition, Exhibit 3, p. 48, lines 7-17]. This action was brought on behalf of the surviving parents and sisters by Dennis G. Martin, California Administrator of the Estate of Harry Eugene Walker, Deceased. Judgment of the trial court in favor of plaintiff was reversed by the Ninth Circuit Court of Appeals and the action dismissed.

The death occurred after a new superintendent of Yellowstone Park decided to close down isolated garbage dumps in 1969, 1970, and 1971. This resulted in dispersing grizzly bears into population centers of the park. The trial court found that the Park Service employees, in carrying out the closure, failed to give any warning of this hazardous operation to visitors, including Harry Walker; failed to use due care for the safety of park visitors in executing the decision; failed to follow safety procedures outlined by a government advisory committee for the protection of visitors; failed to follow safety procedures set up by the committee for transplant or other elimination of grizzlies habituating visitor areas, including the bear, previously trapped in the Old Faithful visitor area, that returned and killed Harry Walker.

The trial was in the United States District Court for the Central District of California between January 9 and February 24, 1975.* The trial judge gave judgment for decedent's mother, father, and youngest sister in the sum of $87,417.67. On December 3, 1976, the Ninth Circuit Court of Appeals reversed, dismissing the action with costs, on grounds that the discretionary exemption extended to the execution of the grizzly program (December 3, 1976). Contemporaneously (December 27, 1976), the United States Court of Appeals for the Tenth Circuit rendered an opinion

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*Counsel for both sides did extensive pre-trial discovery. The reporter's transcript was 1744 pages, in eleven volumes; the clerk's transcript was 823 pages, in four volumes. Thirty-two (32) depositions were taken.

in a Yellowstone case (not involving grizzlies) limiting the discretionary exemption and imposing a duty on the government to warn visitors of dangers. [*Smith v. U.S.*, 10th Circuit, Dec. 27, 1976, 546 F.2d 872.]

Walker, age twenty-five, and his friend, Phillip Bradberry, hitchhiked from their homes at Anniston, Alabama, to Yellowstone National Park, entering at the North (Gardiner, Montana) entrance on the afternoon of June 22, 1972. At the time these boys and other visitors entered Yellowstone in June, 1972, they unknowingly faced dangers unprecedented in park history. Back-country open pit garbage dumps had been closed, sending grizzly bears to the centers of population in search of food.

The grizzly bear is the strongest land mammal in North America. Its strength can be fully appreciated only if felt or observed. Left undisturbed by the Indians, and early white settlers who shared its land, the giant bear was free to roam where it pleased. Most of the grizzly bears residing in the Western United States are found in a narrow corridor, including Glacier National Park south to Yellowstone and the Grand Tetons, and the largest concentration of grizzly bears is in the Yellowstone plateau, or ecosystem, centering in Yellowstone National Park. [Craighead narrative testimony, Exhibit 38, p. 4, lines 8-19.]

Neither grizzly bears nor black bears track and try to kill humans, If surprised, grizzly bears will kill humans. Then if the bear is hungry, it might eat. But grizzly bears who have not entered places of human use and habitation will, if not surprised, avoid humans.

One cannot say that a grizzly bear is ever afraid of man, but a grizzly bear which enters the area of human use and habitation loses the respect for humans that ordinarily keeps grizzly bears at a distance. Such a bear will often return to areas where human contact is possible. Such bears are without fear of or respect for humans, and are a threat to the visitor population of the park. [Exhibit 38, p. 10.]

Open pit garbage dumps came into existence with the establishment of Yellowstone Park and had become traditional feeding areas for grizzlies. In spring, for one hundred years, grizzlies had moved from distant parts of the park and even from beyond its borders into the middle back-country of the park, where the Trout Creek and Rabbit Creek garbage dumps were located. These earthfilled dumps provided supplemental food for the bears and tended to keep them zoned away from people. These food-disposal areas were integrally meshed with the grizzly bear ecology in Yellowstone. Except for the nature of the food, they were ecological equivalents of the spawning salmon runs that attract and concentrate Alaskan brown bears during the summer months. Yellowstone garbage sites, prior to their closing, concentrated the grizzly bears away from areas of human use during the three-month period from June through August, and were extremely effective in reducing the probability of grizzly-man encounters. [Exhibit 39, "Grizzly Bear-Man Relationship in Yellowstone National Park," BioScience, August 15, 1971,* Dr. Frank C. Craighead and Dr. John

*See, Fig. 1, Appendix p. A-37, Exhibit 39, Craighead article, BioScience, *supra, loc. cit.* map of Yellowstone National Park showing developed areas and garbage dumps; Fig. 2, *ibid.*, frequency of capture and number of grizzly bears captured in campgrounds.

J. Craighead, Exhibit 39.]* In the fall of the year with the drop in food refuse, the bears dispersed outward to fall foraging and winter den sites. [Exhibit 38, p. 8.] Chief Park biologist Cole admitted that on the closing of the dump grizzlies would "no longer be concentrating at the dump." [Cole Deposition, Exhibit 9, pp. 46-47.]

But with the closing of the large Trout Creek dump during the spring and summer of 1971, and the West Yellowstone dump in 1971, approximately 180 grizzlies were dispersed, and this action created "more acute bear problems in campgrounds and developed areas . . . than have existed in 100 years of Park history." [Exhibit 39, pp. 855, 856.] (See fig. 2.)

*Dr. Frank C. Craighead testified at length at the trial as plaintiff's witness. Dr. Craighead's qualifications as expert were set forth in eleven pages of Exhibit 38. Since 1959, Drs. Frank and John Craighead had studied grizzly bears at Yellowstone and had a laboratory in the Park until 1970. In 1967, at the request of the Park Service, Dr. Craighead and his brother, John Craighead, prepared a 113-page report, "Management of Bears in Yellowstone National Park." [Exhibit 40.] Their study [Exhibit 64], National Geographic, Aug. '66, "Trailing Yellowstone Grizzlies by Radio," showed their techniques in trapping, immobilizing, and radio-tracking grizzly bears. [Also see Exhibit 65.] Dr. Frank Craighead testified he had personally participated in capture and marking of 450 grizzly bears [Rep.Tr. p. 187].

They were pre-eminent experts on Yellowstone grizzlies. [Rep. Tr. p. 1538, lines 2-8.]

The Court qualified him as a grizzly bear expert at Rep.Tr. p. 186, lines 11-18, admitting Exhibit 38, his narrative testimony. In evaluating Dr. Craighead's testimony, the trial judge stated:

> "THE COURT: . . . He impressed me as a very calm individual, diffident, and who always wanted to be available to express his views if he was asked for it, and not angry at anybody at all. He really impressed me that way quite favorably. . . ."

Black bears, one of the Park's chief attractions, had been familiar to visitors for years and constituted one of the Park's chief attractions. They became "panhandlers," or car bears, causing "bear jams," where visitors stopped their cars along the park's highways to photo and feed the bears. Grizzlies, however, never become car bears. The grizzly's natural instinct is to avoid humans. [Exhibit 38, p. 9, lines 18-30; Ranger Williamson Deposition, Exhibit 3, p. 80.]

In 1968 there was a change of park administration, and Jack Anderson became Superintendent. He decided the dumps should be closed. In 1968 Anderson ordered the volume of garbage at the Trout Creek dump drastically reduced. This forced grizzlies into the developed areas. [See cross-examination of Superintendent Anderson, Rep.Tr. p. 1139, line 18 to p. 1141, line 6, *cf.* Exhibit 39, p. 852.] The number of grizzlies captured in campgrounds and developed areas during this year was about four times the average in the previous nine years. [Exhibit 39; admitted by Anderson on cross-examination, Rep.Tr. p. 1141, line 9, to p. 1142, line 11.] The frequency of capture was the highest in ten years [Rep. Tr. p. 1142, lines 9-11].

Anderson called a meeting of the National Sciences Advisory Committee of the National Park Service [16 U.S.C. §1a-2], Starker Leopold, Chairman, for September 6-7, 1969, at Yellowstone, to obtain advice on how to close the dumps. The Committee (Starker Leopold) report, "A Bear Management Policy and Program for Yellowstone National Park" [Exhibit 42], made note that one plan "is to cut off all garbage

quickly . . ." and that "the opposite contention is to phase out garbage feeding over a period of time, 'weaning' the bears gradually" [Exhibit 42, p. 3, lines 11-21] (favored by the Craigheads). Eventually Anderson decided to close the dumps abruptly.

Dr. John Craighead, at the International Bear Conference at Calgary, Alberta, Canada, November 6-9, 1970, stated on the floor of the meeting, in the presence of Glen Cole, Yellowstone Chief Research Biologist [Rep. Tr. p. 1019, line 3]: "It's very obvious that if Trout Creek [dump] is closed down, . . . there are going to be tremendous changes in the movements and habits [of grizzlies] . . . I would even go so far as to predict that if it is done, there is very likely to be fatality in Yellowstone. . . ." Cole passed this advice on to Anderson. [Cole Deposition, Exhibit 9, p. 47, lines 7-17, p. 43, line 14, through p. 47, line 17.]

The Committee made recommendations for safeguards and procedures to be used in the execution of either plan. [Exhibit 42, Appendix A-26.] The Committee expected grizzlies to "gravitate into campgrounds" [Exhibit 42, Appendix p. A-27], and recommended public education including road signs, printed handouts, and verbal instruction at campfire programs. The Park Service failed to carry out these recommendations. It made no road signs, no printed handouts, no public education, no warning signs regarding the expected grizzly dangers. [Rapier deposition, Exhibit 35, no signs in

thermal area.] Instead, the Park Service kept the old "do not feed or molest the animals" signs showing friendly black bears [Photos' Exhibits 23, 24, 25]; avoided all signs warning of grizzlies, although the service knew of such signs at Glacier Park [*infra;* Cole Deposition, Exhibit 9, pp. 39-41];* gave no handouts whatsoever to hitchhikers who rode in employee cars, although the rangers knew these visitors camped out; it failed properly to instruct park employees of the expected dangers from grizzlies due to dumps closing, or that grizzly bears were different from black bears; it permitted continued "bear jams" where visitors "mingled" along the road with black bears [Photos, Exhibits 26-A, 26-B], without any warning that different, more dangerous bears were being dispersed towards visitor areas; it continued to use old grizzly literature stating that grizzlies were seldom seen in campgrounds. [Exhibit 31, "In Grizzly Country"; Exhibit 32, p. 34, lines 16-18.] The Committee recommended carrion feeding "as a substitute for garbage . . . to draw bears away from campgrounds. Dropped by helicopter in outlaying districts, the carcasses of surplus beasts (emaciated park ungulates . . .) may help reduce the concentration of grizzlies around areas occupied by people. . . ." [Exhibit 42, Appendix, p. A-29.]

In failure of performance, Superintendent Anderson refused to use carrion and excess elk, even though Interior Department's "Wildlife Management in the National Parks" (U.S. Gov't. Printing Office 1969-0-353-

*Asked if there were any similar warning signs at Yellowstone, Chief Park biologist Cole stated, "I believe there was one put in this fall [1972] right below the housing area [at Gardiner, Montana] . . .," but he was unaware of any signs on trails. [Cole Deposition, Exhibit 9, pp. 39-41.]

966, 1969 Reprint of 1963 Report), (1969) specifically stated that the excess elk in Yellowstone were ruining the range.

The Committee recommended closing the campgrounds "situated in the vicinity of the garbage dumps. . . ." The Park Service did close the Old Faithful campgrounds. In June, 1972, when Harry Walker came to Old Faithful, all public campgrounds in the Old Faithful Sub-District were closed. The nearest campground north along the road was 16 miles at Madison Junction; the nearest campground in the other direction was at Grant Village, 20 miles east. [Exhibit 3, Williamson Deposition, pp. 91-92.] Nevertheless, many hitchhikers and backpackers camped in the Old Faithful Sub-District of Yellowstone Park, with knowledge of the Yellowstone Rangers. [Exhibit 3, p. 98, lines 8-25, p. 99, lines 1-6; Brady Deposition, Exhibit 5, p. 69, lines 6-7, p. 71.] Regulations against hitchhiking were not vigorously enforced [Ranger Williamson, Exhibit 3, p. 98; Ranger Brady, Exhibit 5, p. 72]. Head District Ranger Williamson (and the other rangers) also were aware backpackers slept out in the forests near Old Faithful in June, 1972. [Williamson Deposition, Exhibit 3, pp. 98, 99. See list of backpackers giving information at Old Faithful after Walker's death, Exhibit 14. Ranger Schroeder said he contacted 60 backpackers after Walker's death. Schroeder Deposition, Exhibit 32, pp. 23, 24. Ranger Cherry stated that the effort to warn backpackers was after Walker's death. Cherry Deposition, Exhibit 4, p. 21. See Exhibit 3, p. 108, lines 24-25.]

Prior to 1969, Frank Craighead had slept outside in his sleeping bag in many different areas of the park including Old Faithful, in places that were not estab-

lished camps [Rep.Tr. p. 190, lines 18-19]. He had slept quite close to grizzlies at times and he "never really had any apprehension until there were changes that began to bring grizzlies moving into campgrounds." After these changes, he certainly never would have slept in campgrounds at Canyon and Old Faithful himself [Rep. Tr. p. 190, line 25, p. 191, lines 1-6].

The Committee recommended that the reaction of the grizzlies be studied as the dumps were closed. [Appendix, p. A-29.] The Committee specifically recommended the continued tracking of bears already marked or instrumented (Craighead markings and instruments). [Appendix, p. A-30.] They recommended the recording of numbers and densities of bears at all dumps as the food sources were pinched off, and the monitoring of human contacts with grizzlies. They recommended continuing long-term research. [Appendix, pp. A-31-32.] The Committee recommended:

> "When a troublesome bear is transplanted, every possible effort should be made to make the *initial transplant* succeed. If the first release is in wild but hospitable terrain, far from human habitation, the animals may be successfully acclimated, particularly a young animal. In the past, many trapped bears have been released at convenient points near roads or border stations, where they quickly gravitate back to camp searching. Helicopter transport, though costly, may be one effective way to assure successful transplantation." [Appendix, p. A-30.]

Incorrigible grizzlies should be killed. [Appendix, A-31.]

Harry Walker was killed by an old troublesome bear, No. 1792, that had been trapped in the middle of the Old Faithful visitor area in October, 1970, and transplanted only 18 miles away. [Brady Deposition, Exhibit 5, pp. 34, 35; Exhibit 1 (map).]

Superintendent Anderson's response to this was to close down the Craigheads' laboratories at Canyon (1970) [Rep.Tr. p. 712, lines 19-21; p. 714, lines 1-9]; to order the removal of markers; to order the removal of instruments; to discontinue instrument tracking; to discontinue monitoring of human/bear contacts, except as noted in "bear logs." [Exhibit 61, Bear Log Entries, July 5 and 17, 1971].*

The National Academy of Sciences, Official Report to Secretary of Interior, 1974, termed the Craighead research to be:

> ". . . a uniquely rich data bank. It is certainly the best available for a population of grizzly bears. Additional research is clearly needed . . . [Exhibit 43, p. 9, lines 10-13] the Craigheads secured much of their more valuable [than Yellowstone Park Service data] information from bears marked with conspicuous plastic streamers, which facilitated recognition of individual bears in the field, and from bears that were fitted with radio transmitter collars for telemetric observation. . . . [*Ibid.*, p. 6.] The research program carried out by the National Park Service administration since 1970 has been inadequate to provide the data essential

*But Park biologist Cole stated ". . . the schedule for closing dumps was open-ended dependent upon what happened." Cole Deposition, Exhibit 9, pp. 51, 52.

for devising sound management policies for the grizzly bears of the Yellowstone ecosystem." [*Ibid.*, p. 38, lines 5-9.]

A maid at Old Faithful Lodge gave Walker and his friend a ride into the park from Livingston, Montana. [Searer-Schlict Deposition, Exhibit 2, p. 3, lines 1-15, p. 4, lines 18-25.] She (Vikki Searer-Schlict) had a decal on her car showing she was an employee. The ranger at the entrance station waved them through. [*Ibid.*, p 5, lines 1-20.] No entrance fee was collected. No literature of any sort was given the two visitors as they entered. [*Ibid.*, p. 5, lines 16-17, p. 28, lines 3-25, p. 29, lines 1-2.]

The folders available at the park entrances (other than fishing maps and information) were three items. [Williamson Deposition, Exhibit 3, p. 69, lines 24-25, p. 70, lines 1-25]: (1) a mini-folder with a map of the park [Exhibit 1 to Exhibit 3]; (2) a pamphlet entitled, "Enjoy Them at a Distance" [Exhibit 30], and (3) a pamphlet entitled "Danger" [Exhibit 17 to Williamson Deposition, Exhibit 3]. The pamphlet "Enjoy Them at a Distance," Exhibit 30, showed pictures of black bears and cubs and stated:

> "Park bears and other animals are dangerous. Don't encourage them to approach. Park regulations prohibit feeding or molesting animals. Stop cars in pullouts only, not on roadway. Keep car windows closed when near bears. . . . Because of their protected status they have lost their fear of man. While this may make them appear tame, actually in this state they are more dangerous. Troublesome bears are trapped and removed to remote areas of the park. . . ."

The pamphlet "Danger" [Exhibit 17 to Exhibit 3] stated:

> "Watch out for bears. They are dangerous—particularly when accompanied by young. It is reckless to approach bears closely; even though they may appear tame, bears and other wildlife may turn suddenly and inflict serious injury. ***Don't feed the bears*** or other wildlife. . . . Warning ***All park animals are wild***. Their actions and reactions with people nearby are unpredictable and can often prove fatal."

The pamphlet "In Grizzly Country" [Exhibit 31] was not given out at the entrances [Exhibit 3, p. 72, lines 1-6]. This pamphlet was available only at the Ranger Station which was away from the visitor centers at Old Faithful. It stated:

> "Black bears sometimes prowl through the campgrounds in search of food, but grizzlies are rarely seen, except in the back country. Even there, they are not a common sight." ["In Grizzly Country", Exhibit 31.]

Signs to the right of the entrance station were of two kinds: One sign, with a schematic map, stated: "No overnight stopping, except at designated locations." [Picture, Exhibit 25.] The other sign contained a picture of a black bear and other animals, and contained a legend: "Park regulations prohibit feeding or molesting of animals for your personal safety. Watch from a safe distance. Keep windows closed." [Picture, Exhibit 23.]

Glen F. Cole, Chief Yellowstone Research Biologist, was familiar with Glacier Park. He knew of the prior grizzly incidents to Glacier. He was aware that grizzly

warnings, "Notice to Hikers," were used extensively at Glacier Park [Exhibit 36]. [Cole Deposition, Exhibit 9, p. 39, lines 22-25, p. 40, line 17.] There were no such signs used in Yellowstone Park. [*Ibid.*, p. 41.] Though there were lots of signs regarding thermal features in the Old Faithful geyser basin, near where Walker and Bradberry camped, there were no signs relating to bears or grizzlies [Map, Exhibit A, Ranger Rapier Deposition, Rep.Tr. p. 1328, lines 8-15]. There were no signs anywhere in the park warning hikers of the danger of grizzly bears, or of the dangerous operation in process [Cole deposition, Exhibit 9, p. 41, lines 4-9]. It appears that the Court of Appeals did not recognize the differences in danger and habitat between the black bears and the grizzlies, although the trial court was quite aware of these differences.

As Vikki Searer drove Harry Walker and Phillip Bradberry south, in the park:

> "There was some bears on the road and a lot of tourists . . . They were playing tag with—well, that is what I call it, with the bear, running in and out of the cars like, you know, like they go in and out like that. . . . And as I was pulling away through there was—they were feeding, I can't remember if it was a cub or the mother bear. I don't remember. But it had its head in the car all the way through, like up to its shoulders." [Vikki Searer (Schlict) identified picture of "bear jam," Exhibit 26-A, Exhibit 2, p. 32, lines 4-25, p. 33, lines 1-2.]
>
> "I remember talking to Harry about them. . . . We just talked about tourist conditions with the animals, Harry and I were most amazed with the way the tourists reacted and the way they

> got out and mingled with the bears. We discussed it considerably. . . ." [*Ibid.*, p. 33, lines 17-25.] ". . . he too thought it was ridiculous for these people to be feeding the bears." [*Ibid.* p. 34, lines 16-19.]

Asked if she distinguished between black bears and grizzlies, Vikki answered:

> "No. We just lumped them together. Bears were bears." [Searer Deposition, Exhibit 2, p. 46, lines 22-24.]

Bradberry related:

> "We just couldn't believe that the tourists, you know, like would be associated and mingling with the animals, wild animals, that is, the way they were, and we was just sort, we had the feeling sort of for the animals, you know. . . . Like I said, we didn't want to camp with tourists. We just wanted to get as far away from it as we could." [Bradberry Deposition, Exhibit 1 to Exhibit P, p. 25, lines 6-9.]

At Old Faithful, Walker and Bradberry left Vikki at the Inn and walked on the nearby paths in the geyser basin, heading up a ridge into the woods, as they had done camping out in the parks in Alabama.

The boys asked Vikki where to camp and she didn't know, so they got their packs and continued along the boardwalk in the geyser basin in front of the Inn, and they just decided to go into the woods.* "To get as far . . . from the tourists as we could get."

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*Exhibit 21 is 8 photographs of the Old Faithful area and the Walker campsite. Exhibit 16 is a survey map of Yellowstone. Exhibit 17 is a survey map of Old Faithful quadrangle. Exhibit 19 is a guide map of the upper geyser basin.

[Bradberry Interview by Ranger Connolly, Exhibit 1 to Exhibit 1, p. 6, lines 6-14.] They set up camp in a spot on the ridge about 200-235 yards from the geyser basin boardwalks, about a half-mile from Old Faithful Inn, in what Ranger Schroeder called "fringe area" of Old Faithful. [Cherry Deposition, Exhibit 4, p. 9, lines 13-15.] Later Vikki came to visit them at the camp, but it was raining and they couldn't get a fire started, and Harry took her back to the Inn. [Ibid., p. 8, lines 15-20.] They intended to go to an "information-like place" next day (at Old Faithful) and get maps and information about going deeper into the park. [Ibid., p. 13, lines 28-32, to p. 14, lines 1-6; Exhibit 1 to Exhibit 1, p. 33, Ranger Connolly Interview of Bradberry.]

Walker was killed by grizzly bear #1792 the night of June 25-26, as he and Bradberry returned from Old Faithful. His body was found about 165 feet south (in the direction of the boardwalk) of the camp. [Williamson Deposition, Exhibit 3, p. 51.] (For description, see Bradberry statement, Exhibit 1 to Exhibit 1, pp. 9-10.) There was no evidence whether the bear had been in the camp prior to killing Walker.

The grizzly was snared, shot, and transported by helicopter to Bozeman, Montana. The autopsy [Exhibit 20] of the bear ("YNP 1792") showed human hairs in the descending colon. The bear was about twenty years of age, all canine teeth were broken and worn smooth to the level of the worn incisor teeth. [Williamson Deposition, Exhibit 3, p. 78; Brady Deposition, Exhibit 5, p. 37.] The cheek teeth had considerable use and were smoothly cupped. She had had no cubs during 1972. She weighed 232 pounds. Kenneth R. Greer, Lab Supervisor, stated: "This female was a very old individual of average size. . . ."

A tag was present on the left ear, "YNP 1792." The bear had been trapped in the garbage holding area in back of Old Faithful Inn, October 14, 1970, in the midst of Park visitor facilities, and transplanted to Gibbon Meadow, about eighteen miles north along the road. [Bear Card, Exhibit 28, Williamson Deposition, Exhibit 3, pp. 77-78.]

On August 23, 1970, a piece of scalp and a blanket with some hair in it was discovered near the Fire Hole Bridge [Rep. Tr. p. 1340, lines 23-25, p. 1341, lines 1-4] immediately adjacent to Old Faithful. There was a search for a body. The blanket with hair (but not the scalp) was sent to the FBI for analysis to determine if it was human hair [Rep. Tr. p. 1340, lines 12-14, p. 1341, lines 5-9; Schroeder Deposition, Exhibit 32, pp. 21-22]. (Chief Park Ranger Estey's letter to the FBI is Exhibit UU. The hair returned by the FBI is Exhibit EE. [Rep. Tr. pp. 1556-57.]) On September 16, 1970, an abandoned campsite was discovered on the Fire Hole River a short distance upstream from the road near Old Faithful, one-half mile from Ranger Station in Old Faithful visitor area.* [Williamson Deposition, Exhibit 3, pp. 80-82.] It had been unattended for some time, at least a week or so. [Williamson Deposition, Exhibit 3, pp. 104-05.] Ranger Brady determined that a bear had attacked the camp [Brady Deposition, p. 40, lines 1-20.] The owner of the camp was never found [Brady Deposition, p. 39, lines 13-16.] The bear that attacked

*The Court of Appeals did not mention the proximity of this camp to Old Faithful.

the camp was never identified [Brady Deposition p. 25, line 24 to p. 26, line 13, p. 39, lines 2-16]. (See Exhibits Y and Z for photos and Rep.Tr. p. 1371, identifying Fire Hole abandoned camp.)

The bear #1792 was seen several times in the Old Faithful developed area prior to October 14, 1970, and attempts were made to trap it.

> "That particular bear frequented the area in the evening, especially the garbage area behind the camper cabins . . . [he had been sighted] . . . four to six times within a week." [Cherry Deposition, Exhibit 4, p. 23, lines 2-20.]

Brady had reports of ". . . this bear, another bear, I don't know" from a camper cabin, and he set and trapped this bear [Rep. Tr. p. 1400, lines 13-19.] It was trapped by Brady on October 14, 1970, behind Camper Cabin Cafe, tagged by Brady, and released eighteen miles north of Old Faithful at Gibbon Meadow. [Brady Deposition, Exhibit 5, p. 65, lines 18-24.] Brady, Sub-District Ranger at Old Faithful, had not been told by Cole or anyone else that grizzly bears had to be transplanted fifty miles or more in order to avoid the bear returning because of its homing instinct. [Exhibit 5, p. 58, line 5 to p. 59, line 6.] He was vague on who selected Gibbon Meadow but he played a leading role in the selection [Exhibit 5, p. 96, line 25-p. 97, line 11]. He did not examine the bear's teeth at the time. He examined the teeth of the bear after it had been killed, in 1972, and the teeth were worn and smooth [Brady Deposition, Exhibit 5, p. 37, line 26, p. 96, lines 1-5.] A bear with worn and smooth teeth, an old bear, is more

dangerous to humans because it is less able to compete for food [Craighead testimony, Rep. Tr. p. 266, lines 1-17].

Ranger Williamson connected this bear in his mind with damage previously done to garbage rooms [Williamson Deposition, Exhibit 3, pp. 104-08]. Ranger Cherry said the damaged cans he saw at the Fire Hole campsite resembled the cans at the Walker campsite. [Cherry Deposition, Exhibit 4, p. 33.] It never entered Brady's mind that the bear he trapped October 14, 1970, might reasonably have been the same bear involved in the August-September incidents [Brady Deposition, Exhibit 5, p. 61, lines 20-24]. Dr. Craighead was asked whether it was prudent for the Park Service to send this bear off only eighteen miles to Gibbon Meadow:

> "A. I think he certainly should have made some association between trapping an old bear in this area and the fact that a man had disappeared and a camp had been torn up by a bear, and take some action that would insure that if this bear was involved, it wouldn't happen again.
>
> "Q. Would he have been prudent to assume that this was the same bear? Would that have been a prudent assumption?
>
> "A. I think it would. He couldn't have proved it, of course, but I think it would have been prudent to assume that there was a tie-in there yes." [Rep. Tr. p. 212, lines 1-17.]

Later Craighead said that the Park Service, knowing what it knew of bear #1792 in October, 1970, should have destroyed the bear [Rep. Tr. p. 212, lines 3-

17; to same effect, Rep.Tr. p. 1595, lines 8-25, p. 1596, lines 1-18].* The Leopold Committee recommended killing of dangerous bears [Appendix A-30, 31]. Bradberry testified that he heard one of the rangers state, "This was a 'rogue bear,' and never should have been here" [Bradberry deposition, Exhibit 1, p. 93, lines 3-16, p. 104, line 23, p. 105, lines 1-11.]

Comparing the pamphlet, "In Grizzly Country" [Exhibit 31], which was given only from the ranger station to back-country campers, and the items mentioned on the use permit [Exhibit B to Schroeder Deposition] to be used Park-wide starting July 1, 1972, Walker and Bradberry scored high. As recommended: their campsite was not on a trail; it was in the trees; it was at least 25 feet away from a water course; the food was kept in plastic containers; the tent, sleeping bags and clothing were kept separate from food smells; food prepared for use was hung in a tree (and was not touched by the bear) [Exhibit U]; trash and

*"THE WITNESS [Dr. Craighead]: It is generally realized that the older bears who have difficulty getting food can be more dangerous than others. I think that under the circumstances it would have been prudent, as I mentioned before, to examine the teeth of this animal and to—if it looked like an old animal, to make some relation between that animal and the destruction of the camp along the Fire Hole River. . . .

"On the basis of it being an old bear and the possibility that it caused the destruction of the camp, serious consideration should have been given as to how far to transplant it or even possibly eliminate it."

And earlier, Rep.Tr. p. 120: "Certainly a bear moved only eighteen miles away, in my experience in transplanting them and tracking them by radio, would readily return, so that there was a good possibility that the bear that disturbed this [Fire Hole] camp could also have been the bear that was in the Walker boy's camp."

paper was in the fire circle to be burned; the fire circle was away from the tent; the fire circle was marked with stones, and there was no organic rubbish or garbage [Exhibit 3, p. 118, Exhibits H, I, J]. This was a rainy time of year and, even so, they kept the food separate from their tent.*

Dr. Craighead discussed the reasonable practicalities of camping out in grizzly country, and the conditions pertaining in June, 1972 [Rep.Tr. p. 276, lines 7-25, pp. 277-78 through line 24.]

The question was put to the expert witness Craighead by Mr. Zetterberg:

> "From your experience in camping out and camps, would you say that these boys did a reasonable job in their camp, in setting up their camp and the layout and everything, in your opinion?
>
> "The Court: Reasonably prudent job. What a reasonable person would do under the same time, place and circumstance.
>
> "Witness: Yes I think they did." [Rep.Tr. p. 279, lines 4-11.]

Dr. Craighead also testified that it was reasonable that Walker and Bradberry set up camp where they did, under the circumstances pertaining at that time [Rep.Tr. p. 807, lines 19-25, p. 808, lines 1-9], and that their food storage was "quite reasonable" [Rep.Tr.

*Dr. Craighead: "When it's raining, you don't put your food a long way off where you have got to go back and forth to get it. I would say it was quite reasonable to put their food where they did and under the tarp as they did." [Rep.Tr. p. 278, lines 15-24.]

p. 275, lines 15-24]. Ranger Weinblatt stated that before the bear came "very obviously, the food was all neatly placed outside the tent on the red tarp. . . ." [Weinblatt Deposition, Exhibit 37, p. 16, lines 7-14; p. 48, lines 1-5; same effect, Craighead, Rep.Tr. p. 736, lines 18-24.] [See Craighead analysis, Rep.Tr. p. 767, line 22 to p. 770, line 14.] But for the Park Service dump-closing "bear management" program, the Walker campsite would have been a reasonable place to camp [Rep.Tr. p. 281].

WHY THE WRIT SHOULD BE GRANTED.

1. The Opinion Below Squarely Conflicts With and Disregards Indian Towing Co. v. United States and Other Prior Decisions of This Court, and Erodes Away the Beneficial Effects of the Federal Tort Claims Act in Enforcing Careful and Non-Negligent Operation of the National Parks.

The Court of Appeals for the Ninth Circuit leapfrogs over the facts and findings of the case, and applicable law, to dismiss the case as coming within the discretionary exemption, to the Federal Tort Claims Act, 28 U.S.C. §2680(a), citing only one case, *Dalehite v. United States,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953).

Overlooked is *Indian Towing Co. v. United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed.2d 48 (1955); *Rayonier, Inc. v. U.S.,* 352 U.S. 317, 77 S.Ct. 374, 1 L.Ed.2d 354, and other cases that came after *Dalehite.* In the words of the Tenth Circuit Court of Appeals, refusing to adopt the "discretionary" view of the court below:

> "If we were to accept the Government's broad interpretation of the discretionary exception, it is difficult to perceive which duties under tort law could not be avoided by a similar policy decision to ignore them. This would run counter to the Supreme Court's admonition that such exceptions to this remedial law be narrowly construed."
>
> *Smith v. United States,* 10th Circuit, Dec. 27, 1976, 546 F.2d 872, at 877 [citing cases].

While the opinion below neglects to state the facts fully or fairly it still shows that the government was fatally negligent in executing the closure of the back-

country garbage dumps. The decision to close the dumps was made prior to 1970; the dumps were closed down in 1970 and 1971. In September, 1969, the Superintendent was forewarned by an expert committee of his own choosing that the closing of the dumps would "cause a change in the movement and habits of the grizzly bears, and that they would tend to go into the campgrounds in search of food" [A-27]. The Leopold Committee gave operational recommendations which were not followed [A-26-32].

The Superintendent, on closing the dumps, was to expand "the information programs . . ." [A-28] and the "closure of some campgrounds . . ." [A-29], but hitchhikers were waved through the gate by the attendant, receiving no brochures. Available brochures gave no warning of grizzly bears. The sign at the entrance referred in context to automobiles, "overnight stopping . . ." The only pamphlet on grizzlies, "In Grizzly Country" [Exhibit 31], was not available at entrance, and in any event gave no warning that grizzly bears would come down to visitor areas. On the contrary, it said they were seldom seen. No employees warned them of the grizzly bears, the house maid's warning being related to geysers. The employee who drove them to Old Faithful was uninformed of the grizzly dangers, and visited the boys' campsite. The Superintendent did not use carrion feeding advised by experts, to draw the grizzlies away from areas of human use. [A-29.] And although the opinion does not reveal where the Fire Hole River campsite, ravaged by a bear in September, 1970, was (it was on the fringes of Old Faithful), it reveals that in October, 1970, grizzly bear 1792 was incorrigible and was trapped, tagged and transplanted a distance and location negligently inadequate, as fixed by hte Leopold advisory committee [A-30, 31]. It reflects that in September and October 1970, the rangers knew a bear had destroyed the Fire Hole River camp and knew that it was possible that such bear was the same bear, No. 1792, trapped, tagged and transported only 18 miles away.

The opinion below nowhere distinguishes between grizzly bears and black bears, a distinction vital to the safety of park visitors; park administration knew that grizzly bears, more dangerous, unpredictable, seldom seen, did not frequent the visitor areas prior to, but would be expected with, the closing of the dumps.

It is patent in the opinion below, and demonstrated in the findings and in the record, and latent in the facts, that in multiple ways the government's Yellowstone Park employees were negligent, and that the negligence caused the death of Harry Walker. It is ironic that Harry Walker camped in the forest to avoid "tourists" whom Rangers permitted to "mingle" with (black) bears. "The main thing I remember," said Vikki Searer of Harry Walker, "is that he just didn't like a lot of people. . . . He would rather be by himself, and he loved nature is what he told me and things to do with animals and on his own. . . ." [Exhibit 2, p. 32, lines 4-12.] Ironically, he was one for whom Yellowstone was "prescribed and managed." 16 U.S.C. 1a-1.

The government, in other cases, has already cited *Martin* in an attempt to emasculate the Federal Tort Claims Act. *Cameron Smith (supra)* [*loc. cit.* at p. 877]; in *Girard v. U.S.A.*, USDC, Cent.Dist. Calif., #CV 75-885 (pending).

In the grizzly bear case of *Williams v. United States of America,* No. 20670 and 20671, in the District Court of the United States for the Eastern District of Michigan, October 6, 1961 (unpublished) [Clk.Tr. pp. 644-681], the court, in awarding $100,000 for a grizzly bear injury in Glacier Park, refused to apply the discretionary exemption, noting that *Dalehite, supra,* was a four-to-three decision; that the opinion of the dissenters in *Dalehite* became the majority opinion of the United States in *Indian Towing Co., Inc. v. U.S.,* 350 U.S. 61; *United States v. Union Trust Co.,* 350 U.S. 907, and *Rayonier v. U.S.,* 353 U.S. 315.* [Clk. Tr. pp. 656-657.]

In the words of Judge Goldberg, in *Smith v. United States* (5 Cir. 1967), 375 F.2d 243, cert. den. 1967, 389 U.S. 841, 88 S.Ct. 76, 19 L.Ed.2d 106:

> "Most conscious acts of any person whether he works for the government or not, involve choice. Unless government officials (at no matter what echelon) make their choices by flipping coins, their acts involve discretion in making decisions.
>
> "If the Torts Claims Act is to have the corpuscular vitality to cover anything more than automobile accidents in which government officials were driving, the federal courts must reject an absolutist interpretation of *Dalehite,* and that interpretation is rejected by *Indian Towing,* 1955, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed.2d 48, and especially by *Rayonier,* 1957, 352 U.S. 315, 77 S.Ct. 374, 1 L.Ed.2d 354." *Smith, supra,* at 246.

*28 U.S.C. 2680(a) provides that the discretionary exemption applies only when a government employee is "exercising due care."

Negligence occurring in carrying out established policies is not within the discretionary function.

The kind of discretion exercised by the Government in test firing a rocket at a facility of NASA, involving decisions as to day and hour of firing and amount of thrust to be developed was not sufficient to insulate the Government from tort liability ulnder the discretionary function exemption. *Pigott v. U.S.,* 451 F.2d 574 (5th Cir. 1971). There is a consistent trend in decisions in the wake of *Dalehite v. U.S.,* 346 U.S. 15, 73 S.Ct. 956, 97 L.Ed. 1427 (1953), to reject the Government's attempt to characterize decisions not to warn or use safety devices as discretionary. The following cases are examples. *Ward v. U.S.,* 471 F.2d 667 (3d Cir. 1973), involving sonic booms; government required to allege non-negligent operation to raise defense. *American Exchange Bank of Madison, Wisc. v. U.S.,* 257 F.2d 938, 78 A.L.R.2d 879 (7th Cir. 1958), determination of whether handrails should be installed on a stairway was not a discretionary function, nor was maintenance of the Capitol building in a safe condition discretionary. *Moyer v. Martin Marietta Corp.,* 481 F.2d 585 (5th Cir., 1973), reversal of District Court determination that act was discretionary, the reviewing court holding that the furnishing of a defectively designed and manufactured ejection seat, even though it was according to plan, was not a discretionary act. *Griffin v. U.S.,* 500 F.2d 1064 (3d Cir., 1974), involving vaccination under medical supervision. *Seaboard Coastline R. Co. v. U.S.,* 473 F.2d 714 (5th Cir., 1973); *United States v. DeCamp,* 478 F.2d 1188; *Fair v. United States,* 234 F.2d 288 (5th Cir., 1974). In *Fair* the 5th Circuit reanalyzed an

earlier decision by it denying liability based on the exemption, *Indian Towing* having come down in the interim. In holding the exemption inapplicable in a case involving killings by an officer released from an Air Force hospital contrary to the understanding of hospital authorities and the wife of the officer. The court concluded its opinion with the following:

> "The government is liable for the actions of its employees dealing directly with the public in the application of established policy, even if such employees are vested with a measure of discretion, and such liability of the government for their acts and omissions in all of the respects mentioned is measured by the same rules as the local law applies to a private employer under like circumstances."

In *Bullock v. U.S.*, 133 F.Supp. 885 (D.C. Utah 1955), it was held that while whether to hold nuclear tests was discretionary, negligent performance of such tests was not within the exemption. In a recent consideration of §2680(a) by the United States Supreme Court, *Laird v. Nelms*, 406 U.S. 797, 92 S.Ct. 1899, 32 L.Ed.2d 499 (1972), the Supreme Court, in finding that the Government could not be held strictly liable for damage from sonic booms, nevertheless approved *Hatahley v. United States*, 351 U.S. 173, 181, 76 S.Ct. 745, 100 L.Ed. 1065 (1956). In *Hatahley*, the Government was held liable for treble damages for deliberately shooting horses without following procedures set forth in Utah law.

The Ninth Circuit opinion below allows the government to be immunized from liability (citing *Sickman v. United States*, 184 F.2d 616, 619-20 (7th Cir., 1950); *Ashley v. United States*, 215 F.Supp. 39 (D. Neb. 1963) (Van Pelt, judge); and *Rubenstein v. United States*, 338 F.Supp. 654, 657 (N.D. Cal. 1972, cited by court below, A-10.)

In *Sickman*, plaintiff failed to prove at trial or on appeal there was any negligence in a property damage case involving migratory waterfowl.

In *Rubenstein* there was no specific undisclosed danger regarding bears, and on this basis the case was distinguished from *Claypool v. United States*, 98 F.Supp. 702 (S.D. Cal. 1951). *Rubenstein, supra*, at 656. The court approved the *Claypool* standard, *supra*, at 657, and makes no reference whatever to §2680(a). All it does is cite *Ashley* for the fact that there is a public interest in maintaining habitat for wild animals, a conclusion with which plaintiff in this case has no quarrel. Neither *Ashley* nor *Rubenstein* have any bearing on the discretionary question.

Under the Court of Appeals decision below, every decision will be "discretionary," and shortsighted and careless acts of its personnel will be shielded under the umbrella of 28 U.S.C. 2680(a). Properly enforced, the Federal Tort Claims Act is a salutory non-bureaucratic method of requiring government employees to think in human terms in managing the parks. This case, if allowed to stand, will cancel a lot of good law achieved since *Dalehite*.

2. The Court of Appeals Opinion Below Is in Direct Conflict With Cameron Smith, a Tenth Circuit Case Decided the Same Month and Refusing Discretionary Exemption in Another Yellowstone Tort Claims Case; It Is Urged That This Conflict Be Eliminated by Approving the Cameron Smith Ruling, Adopting Other Similar Holdings, and Discarding the Ninth Circuit Ruling Below.

The Court of Appeals opinion cites *Dalehite* [*Dalehite v. U.S., loc. cit.*] only, in deciding this case against plaintiff on the basis of the discretionary exemption. Since *Dalehite,* the Supreme Court has tightened and defined the perimeters of the exemption. *Indian Towing Company v. United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed.2d 48; *Rayonier Inc. v. U.S.,* 352 U.S. 317, 77 S.Ct. 374, 1 L.Ed.2d 354; *United States v. Muniz,* 374 U.S. 150, 83 S.Ct. 1850; *Hatahley v. United States,* 351 U.S. 173, 76 S.Ct. 745, 100 L.Ed. 1065; *Laird v. Nelms,* 406 U.S. 797, 92 S.Ct. 1899, 32 L.Ed.2d 499.

The Fifth Circuit has taken a leadership role in defining and narrowing the exemption. In *Fair v. U.S.,* 234 F.2d 228 (1956), the court held the government liable for negligent release of an officer from an Air Force Hospital who killed plaintiff's decedent. *Smith v. U.S.,* 375 F.2d 243 (1967) ["If the Tort Claims Act is to have the corpuscular vitality to cover anything more than automobile accidents in which government officials were driving, the federal courts must reject an absolutist interpretation of *Dalehite*. . . ." *supra,* p. 246]; *Seaboard Coastline Railroad v. U.S.,* 473 F.2d 714 (1973), negligent design of drainage ditch causing derailment of railroad held not a discretionary function. But in *United States v. Hunsucker,* 314 F.2d

98 (1962), the Ninth Circuit, with Judge Barnes (senior judge below) participating, found no liability for negligent design of drainage facility at Air Force base. *Moyer v. Martin Marietta Corp.,* 481 F.2d 585 (1973), where the Fifth Circuit found that a faulty pilot ejection seat design was within the discretionary exemption; *Roelofs v. U.S.,* 501 F.2d 87 (1974); *J. H. Rutter Rex Mfg. v. U.S.,* 515 F.2d 97 (1975); *Pigott v. U.S.,* 451 F.2d 574 (1971).

Other circuits follow suit. Fourth Circuit, *White v. U.S.,* 317 F.2d 13 (1963), death of a patient undergoing treatment for mental illness, decision of how much freedom to allow patient was not a policy decision meant to be exempt. Ninth Circuit, *United Airlines v. Wiener,* 335 F.2d 379 (1964); Second Circuit, *Ingham v. Eastern Airlines,* 373 F.2d 227 (1967); *Hendry v. U.S.,* 418 F.2d 774 (1969); Ninth Circuit, *Driscoll v. U.S.,* 525 F.2d 136 (1975), where a pedestrian was injured at Luke Air Force Base and the government defended on the basis of discretionary exemption in traffic design; decisions of the base engineer in placing crosswalks and warning devices were held to be operational and not within the discretionary exemption. Also, in *Thorne v. U.S.,* 479 F.2d 804 (1973), the Ninth Circuit found that the government had a special duty to take precautions for the safety of a man digging trenches across the face of a steep spillway, where the government knew the hazards.

The mainstream of law in all these cases is to limit the discretionary exemption. The Court of Appeals below is outside the mainstream, and the government is pushing this case to try to change the flow, to try to avoid the purposes of the Federal Tort Claims Act.

3. The Court of Appeals Opinion Below Violates Rule 52, Federal Rules of Civil Procedure, and if Allowed to Stand, Sets Precedent for Appellate Courts to Enter Into the Finding of Facts on Appeal, a Job Done Better and More Efficiently by Trial Courts.

Rule 52 provides:

> "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ."

The Court of Appeals below held that the trial judge's findings were "clearly erroneous," and that the conduct by the Government employees was within the "discretionary exemption," but the opinion on appeal, in restating the facts, left out important elements of evidence familiar to the trial judge. These include the fact that black bears have habituated the roads and campgrounds in Yellowstone Park, but that grizzly bears are secretive, stay away from areas of human use, and are seldom seen; that grizzlies that have left their wild habitat and entered areas of human habitation thereafter have lost respect for humans and are infinitely more dangerous to humans than black bears; that in the years 1969-72, closing of the back-country dumps by the Superintendent of Yellowstone thereby caused an extremely hazardous situation for visitors to the park, by dispersing grizzly bears into visitor areas normally avoided by grizzly bears; that this dispersal created a necessity for the Park Service to dispose of incorrigible grizzly bears; that no pamphlets or information about grizzly bears were distributed at entrances to the park; that no warnings were given to visitors of the dangerous operation undertaken in the closing

of the dumps; that many backpackers hitchhiked into the park without receiving any brochures; that the only brochure on grizzlies (exhibit 31), not available at entrances, did not warn of the extreme grizzly hazards caused by the closing of the dumps, but advised that grizzlies were seldom seen; that there were no signs or warnings of grizzly bears anywhere in the park, although park officials were aware that grizzly warning signs had been in use at Glacier Park for some years; that although there were no campgrounds within 18 to 20 miles of Old Faithful, and although the Park Service rangers knew the dumps were being closed, they permitted hitchhikers and backpackers to camp in the forest fringe areas at Old Faithful prior to the death of Walker without any warning as to the unusual dangers; that "camping," as distinguished from "campground," regulations were to go into effect park-wide July 1, 1972; that government experts Cole and Pearson, and plaintiff's expert Craighead, all three, agreed that grizzly bears had to be removed more than 50 miles to avoid return of the bear; that the bear logs [Exhibit Q, Q-1] kept on a daily basis by the Park service showed that in 1971, the year before the Walker death, the park had the highest number of human-grizzly confrontations in the history of the park; use of old ungulates for transition feeding of grizzly bears in the back country had been recommended by the National Sciences Advisory Committee, but had not been used by government employees in dealing with the grizzly bear dangers; that government witness Dr. Leopold was not a bear expert but was a bird expert [Exhibit P]; that government bear expert, Dr. Arthur Pearson, acknowledged Dr. Frank Craighead, plaintiff's witness, and his brother, were pre-

eminent experts on Yellowstone grizzly bears; that Dr. Pearson, government grizzly witness, had followed less careful camping practices than Walker; that no grizzly bear warnings had been given to these young men; that there were no restrictions on walking, hiking, or fishing in the forest areas surrounding Old Faithful; that Walker was not killed at his camp, but was attacked by a grizzly bear while walking in the forest, 165 feet from his camp; that there was no evidence to indicate whether the grizzly bear had attacked Walker before destroying the camp or after; that the Fire Hole River camp attacked by a bear on September 16, 1970, was only ½ mile from the Old Faithful visitor center; that grizzly #1792 was trapped within the Old Faithful visitor area, and had been previously seen in the visitor and garbage areas of Old Faithful on at least six occasions and should have been presumed incorrigible; that the rangers, at the time they transplanted #1792, knew that there was a possibility that there had been a death from this grizzly bear at the nearby Fire Hole River campsite in 1970; that Ranger Brady, when he trapped bear #1792, never examined the teeth of the drugged grizzly to determine whether the bear was old and had blunt teeth, and therefore was especially dangerous to humans.

The credibility of Superintendent Anderson, Researcher Cole, Ranger Brady, experts Craighead and Leopold under examination and cross-examination, was observed by the trial Judge.* The findings of the

*Judge Barnes, in the case of *Carter, Schneider, et al. v. Campbell,* 293 F.2d 816, at 822, upheld Rule 52 because "The trial court's conclusion . . . is thus a determination of fact based in large measure upon the trial court's evaluation of expert testimony."

trial court reflect the distinction between black bears and grizzly bears, the distinction not made by the Court of Appeals. Like Vikki Searer, employee in Yellowstone Park, the Court of Appeals just "lumped them all together." Yet the distinction was vital to the case, and failure of government to make this distinction public, to make the danger public, meant death for Walker.

There was also the element of surprise. Superintendent Anderson and the Park Administration deceived witness Leopold. Witness Leopold testified that in 1971 he was told that the grizzlies were no longer a problem. As a result, he did not call a second meeting of the expert committee. The trial judge granted plaintiff's request and ordered the bear logs [Exhibit Q, Q-1] day-to-day records of human-bear confrontations, to be produced. These logs showed that while Leopold was being told all was safe, there were more grizzly-human confrontations than at any time in the history of Yellowstone Park [Rptr. Tr., p. 1608, line 21 to p. 1609, line 9].

These are but examples of reasons to uphold Rule 52.

The findings of fact in this case were not clearly erroneous. They were clearly not erroneous. The trial judge considered the Findings of Fact with great care. Plaintiff's Proposed Findings were served on defendant August 24, 1974. Defendant's Proposed Findings were filed December 27, 1974 [Clerk's Record, p. 527]. On January 27, 1975, plaintiff filed 27 pages of paragraph-by-paragraph documentation of plaintiff's Proposed Findings [Clerk's Record, pp. 682-709]. Original findings of the court were filed March 26, 1975 [Clerk's Record, p. 756]. Defendant then filed ob-

jections to the findings on March 31, 1975 [Clerk's Record, p. 768]. In August of 1975, the judge filed Modified Findings of Fact and Conclusions of Law [Clerk's Record, p. 772]. This shows great care by the trial judge in substantiating his findings. This leads to judicial economy and efficiency in dealing with facts at the trial level.

The proper scope of review by a Court of Appeals is discussed in Volume 9, *Federal Practice and Procedure,* Wright & Miller (1971), Sections 2585 through 2591. The Court of Appeals should not retry facts, should not replace findings by District Court by findings of its own, should not re-evaluate evidence presented to the trial court, should not substitute its judgment for a first-hand evaluation. *Thetford v. U.S.* (C.A. 10th, 1968), 404 F.2d 301.

The role of fact-finding is committed to the trial judge, and his role may not be transferred to the Court of Appeals in the optimistic hope that with three heads the case will turn out differently. *Hughes Tool Co. v. Varel Mfg. Co.* (C.A. 5th, 1964), 336 F.2d 61, 62. The error of such transfer is exactly what has happened in this case.

4. The Federal Government Should Not Be Exempted From a Duty of Due Care to Visitors Because It Fails to Collect an Admission Fee on Entrance, and This Court Should Disavow the Court of Appeals' Holding of "Separate and Unequal" Status on Visitors Admitted Without Fee.

The Court of Appeals opinion notes that Walker and his companion were "waved through the gate by the attendant. . . ." [Appendix p. A-3, lines 9-10.] No fee was collected from the hitchhikers on entrance to the

park. This raised the question of the application of the Wyoming landowner liability limitation act [Appendix p. A-2, lines 8-11; A-11, lines 24-26]. This act limits a landowner's liability to cases of willfulness. The Court of Appeals comments [Appendix pp. A-3, lines 9-12; A-11, lines 32-33] that decedent had "come in without paying the required fee . . ." and found that the Park Service did not "willfully fail to warn decedent of a dangerous condition. . . ." [Appendix p. A-12, lines 4-5].

This establishes a dual standard for government liability in national parks. If a visitor pays, he is entitled to non-negligent treatment. If he doesn't pay, he loses his claim under the Federal Tort Claims Act, unless there is willfulness.

There are many reasons for not collecting a fee on admission to a national park. The Superintendent can waive a fee. An entrance ranger can waive collection of the fee. It is common knowledge that national parks charge visitors on the way out if for some reason the visitor does not pay going in, *e.g.,* where there is no attendant at the gate [Rep. Tr. p. 1212, lines 13-17]. And in any event, the government universally collects a fee from the *vehicle,* not from individuals [36 C.F.R. 18.1-12].

The statute establishing Yellowstone and other national parks does not provide for two-class visitors. 16 U.S.C. §1a-1 provides that the national park system be "preserved and managed for the benefit and inspiration of all the people of the United States." The Wyoming act, whose text was drafted by the Council of State Governments, was passed on impetus of private owners of farmland, timberland and the like, and from

people interested in opening privately-owned wilderness land to recreational use. [Council on State Governments, 1965, suggested states' legislation].

The Court of Appeals follows a superficial student note in 2 *Land and Water Review,* 447 (1967), "The Statute of Visitors in National Parks—Federal Liability Under Current Applicable Wyoming Law. Urged by the Government, this note totally ignores the history and intent of the law, and assumes willy-nilly that it applies to Yellowstone. The author of this note reaches the astonishing conclusion that "since entrance fees are not applicable to children under sixteen years of age," the government owed no duty to such visitors [*ibid.,* p. 459], nor presumably to free guests of the park, those who come in when the gates are not attended, and hitchhikers waved in. One case, *Smith v. United States,* 383 F.Supp. 1076 (D.Wyo. 1974) at 1080, already adopted this astonishing conclusion.

To avoid the cruel and capricious results of an overbroad application of landowner liability limitations, courts have found payment of a "charge" or "valuable consideration" to be satisfied by purchases of food or meals, such as Walker and his companion made in this case. See *Kesner v. Trenton, W. Va.,* 216 S.E. 2d 880 (1975); *Copeland v. Larson,* 74 N.W.2d 745 (1970). In *Goodson v. City of Racine,* 61 Wis.2d 554, 213 N.W.2d 16 (1973), the Wisconsin court decided that government bodies were not within the category of "landowners" in Wisconsin's law.

There is no Wyoming case law on the landowner limitation statute. However, the Supreme Court of Wyoming adopted a broad definition of invitee in the case of *Sinclair Refining Co. v. Redding, Wyo.,* 439 P.2d 20 (1968). The "economic benefit" test was

applied in a circumstance where a car stopped at a gas station solely to allow a passenger to use the restroom. The passenger hurt herself on a protruding pipe on her way back to the car, having purchased nothing. The court noted that both actual and potential economic advantage to the landowner must be examined in determining whether a person is an invitee.

Public policy in national parks should not have to hinge on such minutiae. The policy that Park Service employees should use care in national parks should not be thus subjected to limitations intended for other purposes.

Basic duties should be applicable to Park Service personnel in Yellowstone and all national parks, not only because all people of the United States own, and are invited to national parks, but because such holding will require the National Park Service to improve its standards of service and care.

The trial court found that the defendant failed to provide decedent and other park visitors with adequate warnings about the dangers posed by grizzly bears, and failed to warn visitors, including decedent, of the special extreme danger created by the abrupt closure of the garbage dumps. Wyoming imposes a common law duty to warn. *Loney v. Laramie Auto Company,* 36 Wyo. 339, 255 Pac. 350 (1927). In *Dudley v. Montgomery Ward,* 64 Wyo. 357, 192 P.2d 617 (1949), the court stated:

> "When he (the owner or lessee) expressly or by implication invites others to come upon his premises, *whether for business or any other purpose,* it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence

to render the premises reasonably safe for the visit." (Emphasis added.) *Id.* at 374, 192 P.2d at 622.

Wyoming has also applied the "public invitee principle" to hold a public entity liable for injury to a child on a public playground. *Ramirez v. City of Cheyenne,* 34 Wyo. 67, 241 Pac. 710 (1925).

In *Claypool v. United States,* 98 F.Supp. 702 (S.D. Cal. 1951), a plaintiff had received a brochure (similar or identical with the brochures handed out to visitors in 1972) warning of bears "observe them only from a distance . . ." Plaintiff argued that he had paid a fee and was therefore "an invitee." The court stated that payment [or non-payment] of a fee "did not increase or affect the quantum of care owed the plaintiff by defendant." [*Id.,* at 705.] The court found the government liable under Restatement of Torts, Section 343, for negligence in failing to warn plaintiff of known danger. In *United States v. State of Washington,* 351 F.2d 913 (1965), even Judge Ely* stated:

> "It is well established that there may repose a legal duty to communicate or to attempt to communicate an adequate warning of existing, foreseeable hazard." [P. 917.]

In *Hulet v. U.S.,* 328 F.Supp. 335 (D.Utah 1971), the United States was sued for injuries sustained by a visitor struck by falling rock in the Timpanogos Cave National Monument in Utah. The court held that the Government was negligent in failing to provide

*Compare *Rubenstein v. U.S.,* 338 F.Supp. 654 (N.D.Cal. 1972). The per curiam panel affirming, at 488 F.2d 1071 included Judge Ely); *Ashley v. U.S.,* 215 F.Supp. 39 (D.Neb. 1963) (Van Pelt).

visitors with adequate warnings of the serious hazard which was known to Park Service employees and which the visitor could not reasonably have discovered for herself.

In the area of injury in *Hulet,* falling rocks were a daily occurrence. Although there were two signs on the trail saying, "Watch for falling or rolling rock," the court held that the warnings given were not commensurate with the degree of danger known to exist; were not presented where needed, and that, since the danger was known to the Government, it did not matter whether plaintiff was an invitee or licensee. *Id.* at 337-38.

The unpublished opinion of District Judge Ralph M. Freeman in *Williams v. U.S.,* Nos. 20670 and 20671 (E.D. Mich. 1961) is at pages 644 to 681 of the Record on Appeal. In his opinion, at page 648 of the Record on Appeal, Judge Freeman described brochures and literature, at Glacier Park, similar or identical to literature described in Judge Van Pelt's opinion in this case, using the words "Dangerous" and "Park bears and other animals are wild . . . regulations prohibit feeding or molesting them. Watch them from a safe distance. Pull off the road and stay in your car. . . ." At page 666 of the Record on Appeal, Judge Freeman held that the brochures and the sign at the entrance (similar to those at Yellowstone) "were inadequate warnings. . . ." He sided with Judge Weinfeld in *Claypool* [*Claypool v. U.S.,* 98 F.Supp. 702 (S.D. Cal. 1951)] ". . . where he said that the language of the brochure itself is sufficient to cause those visiting the camp to believe they will be safe in camping out, provided they observe the regulations [against 'feeding and molesting the bears.']."

Conclusion.

This Court of Appeals opinion sets precedent that Rule 52 can be disregarded and that solid, well-supported findings of a trial court can be easily set aside. It extends the "discretionary exemption" so as to contradict and overrule numbers of decisions which have heretofore interpreted *Dalehite* liberally; now the government cites *Martin* so as to cripple and contradict the administration of the Federal Tort Claims Act, so as to protect and encourage government carelessness in administration of national parks. It has already drawn conflict from the United States Circuit Court of Appeals for the Ninth Circuit. It negates government's common sense obligations to warn of known and undisclosed dangers. It adopts into the National Park Administration a dual standard of care owed visitors, imported from state law meant for other purposes. It allows the government to conduct dangerous operations without being careful. It has already raised conflict.

The federal government will use this case, is already using this case, to denigrate the duties owed the public in the national parks, and to diminish Federal Tort Claims Act benefits.

For these reasons, it is petitioned that a writ of certiorari should issue to review the decision and opinion of the Court of Appeals for the Ninth Circuit, entered December 3, 1976.

STEPHEN I. ZETTERBERG,
Counsel for Petitioner.

Opinions Below.

JUDGMENT SOUGHT TO BE REVIEWED.

United States Court of Appeals, for the Ninth Circuit.

Dennis G. Martin, Administrator of the Estate of Harry Eugene Walker, *Plaintiff-Appellee,* vs. United States of America, *Defendant-Appellant.* No. 75-2918.

OPINION
[December 3, 1976].

Appeal from the United States District Court for the Central District of California.

Before: BARNES and ELY, Circuit Judges, and VAN PELT, Senior District Judge*

VAN PELT, Senior District Judge:

This is a Federal Tort Claims Act case. It arises by reason of the death of Harry Eugene Walker, age 25, who was unmarried, on June 25, 1972 in Yellowstone National Park following an attack by a grizzly bear. The trial judge, Judge A. Andrew Hauk, awarded damages of $87,417.67 allocated to decedent's father, mother and sister, plus costs. Defendant, United States of America, has appealed.

While the appellant and appellee do not agree as to the statement of the issues, it is believed that a fair statement of the questions presented by the appeal is:

1) Whether the Tort Claims Act exemption contained in 28 U.S.C. §2680(a) bars a recovery in this case.

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*Honorable Robert Van Pelt, Senior United States District Judge, District of Nebraska, sitting by designation.

2) Whether the United States is liable under the facts of this case for the death of a hitchhiker attacked by a grizzly bear in Yellowstone National Park.

3) Whether the United States was guilty of willfully failing to warn the decedent of a dangerous condition under the facts of this case (The trial court, in effect, so found in finding No. 7.).

4) The standard of care owed by the United States of America to decedent, a hitchhiker, who paid no admission when he entered the park and was camping without permission in an unauthorized area.

5) Whether decedent was contributorily negligent, and if so, whether such negligence bars a recovery.

6) Whether omissions or negligence of the Park Service was the proximate cause of Walker's death.

7) Whether it is sufficient to prove that it was within the realm of possibility that bear Number 1792, which was sought after Walker's death, and killed, was the same bear that had disturbed a camp on Fire Hole River, where a man disappeared in September, 1970, or is the standard one of reasonable probability.

We conclude that our decision on the first issue makes unnecessary deciding the others although comment on some other questions is necessary in a full discussion of the facts.

Originally an issue was made of whether the California state court could appoint an administrator for the estate of an Alabama resident whose only asset was the wrongful death claim. It is not pressed in this court. Interestingly, all of the Yellowstone National Park bear cases have been brought in states other than Wyoming.

The record discloses that decedent Walker and a friend, Phillip Bradberry, who escaped the grizzly bear's attack and summoned aid for Walker, were hitchhiking into Yellowstone National Park on Thursday, June 22, 1972. Vikki Searer, a maid at Old Faithful Inn, was driving to her work in the park and gave them a ride. They arrived at the North park entrance about 5:00 p.m. Searer's car had a sticker on it which identified her as a park employee. She and the two hitchhikers were waved through the gate by the attendant. Thus the two hitchhikers paid no entrance fee and did not receive the brochures distributed to all park visitors, which included a map of the park, a red folder entitled "Danger", and a pamphlet about bears. At the entrance to the park there is a large sign approximately 7 feet by 5 feet with a map on it, showing the designated campground areas and stating: "Overnight stopping permitted only in designated campgrounds." Searer testified that Walker and Bradberry asked her whether they needed a permit to camp and were told that they did and to obtain it at the Ranger Station. They said they did not want to go to the Ranger Station. When they asked her to recommend a good place to camp she again told them to go to the Ranger Station and get a camping permit. This they did not do. Had they gone to the Ranger Station or to the Visitors' Center they would have received pamphlets entitled "In Grizzly Country", a list of designated campgrounds, and a pamphlet entitled "Campground Management." The Rangers would also have evaluated their camping abilities and if entitled could have issued a back country permit and assigned them to a particular site regularly patrolled by the park Rangers.

The men left the Searer car near the girls' dorm for Old Faithful Inn and went to the upper geyser basin and the Old Faithful Geyser area. Here they walked on boardwalks which were posted with signs which advised staying on the boardwalks due to the thermal features. Nevertheless, the two left the boardwalks, walked into the forest, climbed a hill and pitched camp a considerable distance from the boardwalk. Decedent that evening called on Searer at the dorm and then returned to the campsite. The next evening both young men went to the dorm and Searer returned with them to their campsite. She told them they were too close to the geysers and would "catch hell" if caught at an unauthorized campsite. They told her of seeing paw prints, although they may have been joking. She told them she was scared and decedent and Searer returned to the dorm. She saw both hitchhikers the next day, after which the two men returned to the campsite and cooked dinner. They left a pot of food tied in a tree and returned to the dorm area in the evening. As they returned to their campsite around midnight, Walker was attacked by a bear and killed. A sow grizzly, No. 1792, was trapped the next day at the Walker-Bradberry campsite, and killed.

The bear handling policies of Yellowstone Park, both in general and with respect to sow grizzly 1792, were the subject of testimony at the trial. The evidence showed that there had been a meeting at Yellowstone on September 6 and 7, 1970, to consider the management of grizzly bears. Present at this meeting were three members of the National Sciences Advisory Committee, the director of the National Park Service and some of his staff, Jack K. Anderson, Superintendent of Yellowstone, and some of his staff, as well as

three consultants on grizzlies, Dr. John Craighead, Dr. Frank C. Craighead, and Dr. Charles E. Olmsted. Jack K. Anderson testified that everyone at the meeting was in agreement that the garbage dumps at the Park had to be closed to prevent the bears from feeding there. However, there was no consensus as to how this should be done. Essentially, there were two choices —the dumps could be phased out gradually or closed abruptly. Drs. Frank and John Craighead had studied the bears in Yellowstone for several years and maintained a laboratory there which was closed in 1970. They had prepared a 113 page report in 1967 for the National Park Service entitled "Management of Bears in Yellowstone National Park" recommending that any closure of garbage dumps be done slowly or the garbage be replaced with another food source, such as placing carrion out for the bears to eat. It was Dr. Frank Craighead's opinion, both in the report and at trial, that closing the dumps abruptly would cause a change in the movement and habits of the grizzly bears, and that they would tend to go into the campgrounds in search of food. At the September, 1970 meeting a report was presented (referred to as "the Leopold Report") by Dr. A. Starker Leopold, who was Chairman of the National Sciences Advisory Committee from its inception until April, 1972. This report stated that whether the closure of the dumps should be abrupt or gradual depended upon judgment, as there was no data on the subject. The Leopold report did not adopt one theory over the other. Mr. Glen Cole, Chief Research Biologist at Yellowstone, had compiled park records on grizzly injuries to humans and past management of bears in the park and presented this information at the September meeting. The Park

Service drew up an eleven point bear management program based upon the Leopold and Cole reports. The main thrust of this program was to cease feeding garbage to grizzly bears while maintaining the public safety. All members of the National Sciences Advisory Committee supported the abrupt closure decision, and the garbage dumps were closed down in 1970 and 1971. Superintendent Anderson testified that the decision to close the dumps abruptly was made because it was felt that the longer the bears had the garbage to feed upon the more they would rely on it, and new generations of cubs would become accustomed to human food. He also testified that a decision was made not to use supplemental carrion feeding because:

> I felt that we would be instituting another dangerous procedure by placing elk out, where people might wander into a grizzly on an elk unknowingly. Our putting the elk out there, because the implication was that they thought they should be close to campgrounds. And youngsters have a way of walking out of the campground into the wood; . . . .

T. Vol. X, p. 1079, l. 18-23. Superintendent Anderson testified that precautions taken when the dumps were closed included sanitizing the campgrounds, expanding the information programs, extra night patrol Rangers, a six man Ranger team to move bears which appeared close to campgrounds and human areas, and the closure of some campgrounds.

The Government's evidence showed that in 1971, the year when the last park dump was closed, there were no injuries from bears for the first time in 15 years and no injuries again in 1973 and 1974. There

were injuries in 1972, including Walker's death. The only two prior fatalities from grizzlies had been in 1907 and 1916. The Government's testimony was to the effect that the bears encountered in camping areas has dropped each year since 1971.

Dr. Frank Craighead, who was called as a witness for plaintiff, testified that the Government was negligent in creating an unreasonable danger by abruptly closing the garbage dumps and failing to warn decedent and others of the dangers, and that the precautions undertaken were carelessly and faultily planned and negligently effected. With respect to bear No. 1792, Dr. Craighead testified that the Park Service was negligent and did not act with reasonable prudence when on October 14, 1970 it transported a grizzly bear, No. 1792, to Gibbon Meadows, which is 18 miles north of the Old Faithful area. It was Dr. Craighead's opinion that when a bear is transplanted no more than 50 miles away from where it is captured, the bear will soon return to the point of capture. He also testified it was likely that No. 1792 had invaded a camp on September 16, 1970; that it was within the realm of possibility that the bear that destroyed and invaded that camp, which in the record is frequently called the Fire Hole Camp or the Fire Hole River incident, was the same bear seen in the Old Faithful area the week prior to that incident and the same bear which was trapped and then transplanted to Gibbon Meadows. However, Dr. Leopold testified that he considered this a successful move, since bear No. 1792 did not show up for two years after the transplant and there was no evidence that No. 1792 was the bear responsible for the Fire Hole incident. Dr. Leopold

testified that he also thought 18 miles was sufficient since the bear was moved well into the fall and at this time of year the campgrounds are not occupied and the bears are seeking a place to hibernate. Mr. Cole testified that there was no indication that Gibbon Meadows was not a good release site. He stated that some bears released 50 miles away return to the site of their capture and others that are released only 18 miles away do not return to the site of their capture. Dr. Arthur Pearson, a research scientist with Canadian Wildlife Service, testified that often trapping a grizzly bear has a negative impact on the bear, and it will not return to the site at which it was trapped. Dr. Pearson also testified that "each translocation must be judged on its own merits as to whether it is successful" (T. Vol. XIV, p. 1508, l. 19-20) and that based on the knowledge that was available he thought it was reasonable to transplant the bear to Gibbon Meadows, and that the transplant was successful. It was his opinion that the bear was in her normal grizzly habitat at the time of the accident.

The foregoing is only a brief resume of the transcript which comprises 1745 pages, and relates particularly to the exercise by the Government employees of their discretionary functions and duties with respect to bear management.

The parties agree that this court is bound by Judge Hauk's findings of fact unless we find them to be clearly erroneous. In determining whether findings of fact are or are not clearly erroneous, we look to the teaching of *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), where it is stated:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

This panel is firmly convinced that a mistake has been committed by the trial judge in certain of his findings and in entering judgment for the plaintiff. We are likewise firmly convinced that the case should be reversed and dismissed.

The Federal Tort Claims Act, 28 U.S.C. § 2680(a) provides:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

We are convinced that the acts of the Park Service or Interior Department employees which Dr. Craighead said constituted negligence are within the protection of 28 U.S.C. § 2680(a) and the discretionary function rule enunciated in *Dalehite v. United States*, 346 U.S. 15, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953). That case held that various decisions with respect to instituting a fertilizer export program, conducting further experiments regarding the combustibility of the fertilizer, and decisions regarding bagging temperature, bag

labelling, fertilizer coating and bagging material were all made at a planning rather than operational level. The case specifically states that "all employees exercising discretion" are covered by the Act. *Id.* at 33. The summary of the record shows that the decision to abruptly close the garbage dumps was likewise made at the planning level. Superintendent Anderson, who issued the regulations and who made the decisions of which plaintiff and Dr. Craighead complain, was making a policy judgment. Even Dr. Craighead agreed at the trial that the handling of bears is a matter of judgment and someone must apply it. Similarly, we believe that the measures taken to prevent human-bear contact at this time were discretionary, as was the decision to transplant bear No. 1792 to Gibbon Meadows, 18 miles north of the Old Faithful area.

We do not believe it was the intention of Congress in enacting 28 U.S.C. § 2680(a) to fasten liability upon the defendant for its handling of bears generally or sow 1792 in particular when such discretion is exercised reasonably, after investigation, consultation, and reports by qualified experts in the field. It was not the intention of the Congress as we read the Federal Tort Claims Act and the enactments relating to Yellowstone Park, to make the defendant, United States of America, an insurer of the safety of all Yellowstone National Park visitors. Approval of the trial judge's findings and order would, in effect, do that. We should also note that our conclusions here find support in *Rubenstein v. United States,* 338 F. Supp. 654 (N.D. Cal. 1972), a decision by Judge Spencer Williams which was affirmed by a panel of this court in 488 F. 2d 1071.

We would further comment that it is clear that these two young men disregarded the advice and the warnings of Miss Searer and intentionally failed to go to the Ranger Station or the Visitors' Center. Thus they avoided receiving warnings about bears, both grizzly and black. It is clear that they camped in an area which they knew was unauthorized. All of the warnings which the Park Service could devise will do no good as to persons such as decedent and Bradberry who, in effect, refuse to put themselves in contact with persons from whom they would receive advice, including warnings, and by whom they would be told not to camp at a place they seemed determined to camp.

We again note that the two young men disregarded the warnings they did receive. To require the Park Service to post signs and warnings on every boardwalk, path or trail every few hundred feet throughout a park as extensive as Yellowstone would not only be prohibitive in cost but would destroy the park's beauty as well. To require the Park Service to search out from among the 25,000 daily visitors on the days decedent and Bradberry were in the park those two and any others who had entered the park without paying and without receiving the warning bulletins and to hold that failure to warn such individuals is actionable negligence is for the Congress and not for the courts. To date, as we read the Federal Tort Claims Act and the acts relating to Yellowstone in particular, and other national parks generally, the Congress has not intended such broad coverage. Fortunately there are but few who, like decedent and Bradberry, come in without paying the required fee and attempt to

to render the premises reasonably safe for the visit." (Emphasis added.) *Id.* at 374, 192 P.2d at 622.

Wyoming has also applied the "public invitee principle" to hold a public entity liable for injury to a child on a public playground. *Ramirez v. City of Cheyenne,* 34 Wyo. 67, 241 Pac. 710 (1925).

In *Claypool v. United States,* 98 F.Supp. 702 (S.D. Cal. 1951), a plaintiff had received a brochure (similar or identical with the brochures handed out to visitors in 1972) warning of bears "observe them only from a distance . . ." Plaintiff argued that he had paid a fee and was therefore "an invitee." The court stated that payment [or non-payment] of a fee "did not increase or affect the quantum of care owed the plaintiff by defendant." [*Id.,* at 705.] The court found the government liable under Restatement of Torts, Section 343, for negligence in failing to warn plaintiff of known danger. In *United States v. State of Washington,* 351 F.2d 913 (1965), even Judge Ely* stated:

> "It is well established that there may repose a legal duty to communicate or to attempt to communicate an adequate warning of existing, foreseeable hazard." [P. 917.]

In *Hulet v. U.S.,* 328 F.Supp. 335 (D.Utah 1971), the United States was sued for injuries sustained by a visitor struck by falling rock in the Timpanogos Cave National Monument in Utah. The court held that the Government was negligent in failing to provide

*Compare *Rubenstein v. U.S.,* 338 F.Supp. 654 (N.D.Cal. 1972). The per curiam panel affirming, at 488 F.2d 1071 included Judge Ely); *Ashley v. U.S.,* 215 F.Supp. 39 (D.Neb. 1963) (Van Pelt).

visitors with adequate warnings of the serious hazard which was known to Park Service employees and which the visitor could not reasonably have discovered for herself.

In the area of injury in *Hulet,* falling rocks were a daily occurrence. Although there were two signs on the trail saying, "Watch for falling or rolling rock," the court held that the warnings given were not commensurate with the degree of danger known to exist; were not presented where needed, and that, since the danger was known to the Government, it did not matter whether plaintiff was an invitee or licensee. *Id.* at 337-38.

The unpublished opinion of District Judge Ralph M. Freeman in *Williams v. U.S.,* Nos. 20670 and 20671 (E.D. Mich. 1961) is at pages 644 to 681 of the Record on Appeal. In his opinion, at page 648 of the Record on Appeal, Judge Freeman described brochures and literature, at Glacier Park, similar or identical to literature described in Judge Van Pelt's opinion in this case, using the words "Dangerous" and "Park bears and other animals are wild . . . regulations prohibit feeding or molesting them. Watch them from a safe distance. Pull off the road and stay in your car. . . ." At page 666 of the Record on Appeal, Judge Freeman held that the brochures and the sign at the entrance (similar to those at Yellowstone) "were inadequate warnings. . . ." He sided with Judge Weinfeld in *Claypool* [*Claypool v. U.S.,* 98 F.Supp. 702 (S.D. Cal. 1951)] ". . . where he said that the language of the brochure itself is sufficient to cause those visiting the camp to believe they will be safe in camping out, provided they observe the regulations [against 'feeding and molesting the bears.']."

Conclusion.

This Court of Appeals opinion sets precedent that Rule 52 can be disregarded and that solid, well-supported findings of a trial court can be easily set aside. It extends the "discretionary exemption" so as to contradict and overrule numbers of decisions which have heretofore interpreted *Dalehite* liberally; now the government cites *Martin* so as to cripple and contradict the administration of the Federal Tort Claims Act, so as to protect and encourage government carelessness in administration of national parks. It has already drawn conflict from the United States Circuit Court of Appeals for the Ninth Circuit. It negates government's common sense obligations to warn of known and undisclosed dangers. It adopts into the National Park Administration a dual standard of care owed visitors, imported from state law meant for other purposes. It allows the government to conduct dangerous operations without being careful. It has already raised conflict.

The federal government will use this case, is already using this case, to denigrate the duties owed the public in the national parks, and to diminish Federal Tort Claims Act benefits.

For these reasons, it is petitioned that a writ of certiorari should issue to review the decision and opinion of the Court of Appeals for the Ninth Circuit, entered December 3, 1976.

STEPHEN I. ZETTERBERG,
Counsel for Petitioner.

Opinions Below.

JUDGMENT SOUGHT TO BE REVIEWED.

United States Court of Appeals, for the Ninth Circuit.

Dennis G. Martin, Administrator of the Estate of Harry Eugene Walker, *Plaintiff-Appellee*, vs. United States of America, *Defendant-Appellant*. No. 75-2918.

OPINION
[December 3, 1976].

Appeal from the United States District Court for the Central District of California.

Before: BARNES and ELY, Circuit Judges, and VAN PELT, Senior District Judge*

VAN PELT, Senior District Judge:

This is a Federal Tort Claims Act case. It arises by reason of the death of Harry Eugene Walker, age 25, who was unmarried, on June 25, 1972 in Yellowstone National Park following an attack by a grizzly bear. The trial judge, Judge A. Andrew Hauk, awarded damages of $87,417.67 allocated to decedent's father, mother and sister, plus costs. Defendant, United States of America, has appealed.

While the appellant and appellee do not agree as to the statement of the issues, it is believed that a fair statement of the questions presented by the appeal is:

1) Whether the Tort Claims Act exemption contained in 28 U.S.C. §2680(a) bars a recovery in this case.

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*Honorable Robert Van Pelt, Senior United States District Judge, District of Nebraska, sitting by designation.

2) Whether the United States is liable under the facts of this case for the death of a hitchhiker attacked by a grizzly bear in Yellowstone National Park.

3) Whether the United States was guilty of willfully failing to warn the decedent of a dangerous condition under the facts of this case (The trial court, in effect, so found in finding No. 7.).

4) The standard of care owed by the United States of America to decedent, a hitchhiker, who paid no admission when he entered the park and was camping without permission in an unauthorized area.

5) Whether decedent was contributorily negligent, and if so, whether such negligence bars a recovery.

6) Whether omissions or negligence of the Park Service was the proximate cause of Walker's death.

7) Whether it is sufficient to prove that it was within the realm of possibility that bear Number 1792, which was sought after Walker's death, and killed, was the same bear that had disturbed a camp on Fire Hole River, where a man disappeared in September, 1970, or is the standard one of reasonable probability.

We conclude that our decision on the first issue makes unnecessary deciding the others although comment on some other questions is necessary in a full discussion of the facts.

Originally an issue was made of whether the California state court could appoint an administrator for the estate of an Alabama resident whose only asset was the wrongful death claim. It is not pressed in this court. Interestingly, all of the Yellowstone National Park bear cases have been brought in states other than Wyoming.

The record discloses that decedent Walker and a friend, Phillip Bradberry, who escaped the grizzly bear's attack and summoned aid for Walker, were hitchhiking into Yellowstone National Park on Thursday, June 22, 1972. Vikki Searer, a maid at Old Faithful Inn, was driving to her work in the park and gave them a ride. They arrived at the North park entrance about 5:00 p.m. Searer's car had a sticker on it which identified her as a park employee. She and the two hitchhikers were waved through the gate by the attendant. Thus the two hitchhikers paid no entrance fee and did not receive the brochures distributed to all park visitors, which included a map of the park, a red folder entitled "Danger", and a pamphlet about bears. At the entrance to the park there is a large sign approximately 7 feet by 5 feet with a map on it, showing the designated campground areas and stating: "Overnight stopping permitted only in designated campgrounds." Searer testified that Walker and Bradberry asked her whether they needed a permit to camp and were told that they did and to obtain it at the Ranger Station. They said they did not want to go to the Ranger Station. When they asked her to recommend a good place to camp she again told them to go to the Ranger Station and get a camping permit. This they did not do. Had they gone to the Ranger Station or to the Visitors' Center they would have received pamphlets entitled "In Grizzly Country", a list of designated campgrounds, and a pamphlet entitled "Campground Management." The Rangers would also have evaluated their camping abilities and if entitled could have issued a back country permit and assigned them to a particular site regularly patrolled by the park Rangers.

The men left the Searer car near the girls' dorm for Old Faithful Inn and went to the upper geyser basin and the Old Faithful Geyser area. Here they walked on boardwalks which were posted with signs which advised staying on the boardwalks due to the thermal features. Nevertheless, the two left the boardwalks, walked into the forest, climbed a hill and pitched camp a considerable distance from the boardwalk. Decedent that evening called on Searer at the dorm and then returned to the campsite. The next evening both young men went to the dorm and Searer returned with them to their campsite. She told them they were too close to the geysers and would "catch hell" if caught at an unauthorized campsite. They told her of seeing paw prints, although they may have been joking. She told them she was scared and decedent and Searer returned to the dorm. She saw both hitchhikers the next day, after which the two men returned to the campsite and cooked dinner. They left a pot of food tied in a tree and returned to the dorm area in the evening. As they returned to their campsite around midnight, Walker was attacked by a bear and killed. A sow grizzly, No. 1792, was trapped the next day at the Walker-Bradberry campsite, and killed.

The bear handling policies of Yellowstone Park, both in general and with respect to sow grizzly 1792, were the subject of testimony at the trial. The evidence showed that there had been a meeting at Yellowstone on September 6 and 7, 1970, to consider the management of grizzly bears. Present at this meeting were three members of the National Sciences Advisory Committee, the director of the National Park Service and some of his staff, Jack K. Anderson, Superintendent of Yellowstone, and some of his staff, as well as

three consultants on grizzlies, Dr. John Craighead, Dr. Frank C. Craighead, and Dr. Charles E. Olmsted. Jack K. Anderson testified that everyone at the meeting was in agreement that the garbage dumps at the Park had to be closed to prevent the bears from feeding there. However, there was no consensus as to how this should be done. Essentially, there were two choices —the dumps could be phased out gradually or closed abruptly. Drs. Frank and John Craighead had studied the bears in Yellowstone for several years and maintained a laboratory there which was closed in 1970. They had prepared a 113 page report in 1967 for the National Park Service entitled "Management of Bears in Yellowstone National Park" recommending that any closure of garbage dumps be done slowly or the garbage be replaced with another food source, such as placing carrion out for the bears to eat. It was Dr. Frank Craighead's opinion, both in the report and at trial, that closing the dumps abruptly would cause a change in the movement and habits of the grizzly bears, and that they would tend to go into the campgrounds in search of food. At the September, 1970 meeting a report was presented (referred to as "the Leopold Report") by Dr. A. Starker Leopold, who was Chairman of the National Sciences Advisory Committee from its inception until April, 1972. This report stated that whether the closure of the dumps should be abrupt or gradual depended upon judgment, as there was no data on the subject. The Leopold report did not adopt one theory over the other. Mr. Glen Cole, Chief Research Biologist at Yellowstone, had compiled park records on grizzly injuries to humans and past management of bears in the park and presented this information at the September meeting. The Park

Service drew up an eleven point bear management program based upon the Leopold and Cole reports. The main thrust of this program was to cease feeding garbage to grizzly bears while maintaining the public safety. All members of the National Sciences Advisory Committee supported the abrupt closure decision, and the garbage dumps were closed down in 1970 and 1971. Superintendent Anderson testified that the decision to close the dumps abruptly was made because it was felt that the longer the bears had the garbage to feed upon the more they would rely on it, and new generations of cubs would become accustomed to human food. He also testified that a decision was made not to use supplemental carrion feeding because:

> I felt that we would be instituting another dangerous procedure by placing elk out, where people might wander into a grizzly on an elk unknowingly. Our putting the elk out there, because the implication was that they thought they should be close to campgrounds. And youngsters have a way of walking out of the campground into the wood; . . . .

T. Vol. X, p. 1079, l. 18-23. Superintendent Anderson testified that precautions taken when the dumps were closed included sanitizing the campgrounds, expanding the information programs, extra night patrol Rangers, a six man Ranger team to move bears which appeared close to campgrounds and human areas, and the closure of some campgrounds.

The Government's evidence showed that in 1971, the year when the last park dump was closed, there were no injuries from bears for the first time in 15 years and no injuries again in 1973 and 1974. There

were injuries in 1972, including Walker's death. The only two prior fatalities from grizzlies had been in 1907 and 1916. The Government's testimony was to the effect that the bears encountered in camping areas has dropped each year since 1971.

Dr. Frank Craighead, who was called as a witness for plaintiff, testified that the Government was negligent in creating an unreasonable danger by abruptly closing the garbage dumps and failing to warn decedent and others of the dangers, and that the precautions undertaken were carelessly and faultily planned and negligently effected. With respect to bear No. 1792, Dr. Craighead testified that the Park Service was negligent and did not act with reasonable prudence when on October 14, 1970 it transported a grizzly bear, No. 1792, to Gibbon Meadows, which is 18 miles north of the Old Faithful area. It was Dr. Craighead's opinion that when a bear is transplanted no more than 50 miles away from where it is captured, the bear will soon return to the point of capture. He also testified it was likely that No. 1792 had invaded a camp on September 16, 1970; that it was within the realm of possibility that the bear that destroyed and invaded that camp, which in the record is frequently called the Fire Hole Camp or the Fire Hole River incident, was the same bear seen in the Old Faithful area the week prior to that incident and the same bear which was trapped and then transplanted to Gibbon Meadows. However, Dr. Leopold testified that he considered this a successful move, since bear No. 1792 did not show up for two years after the transplant and there was no evidence that No. 1792 was the bear responsible for the Fire Hole incident. Dr. Leopold

testified that he also thought 18 miles was sufficient since the bear was moved well into the fall and at this time of year the campgrounds are not occupied and the bears are seeking a place to hibernate. Mr. Cole testified that there was no indication that Gibbon Meadows was not a good release site. He stated that some bears released 50 miles away return to the site of their capture and others that are released only 18 miles away do not return to the site of their capture. Dr. Arthur Pearson, a research scientist with Canadian Wildlife Service, testified that often trapping a grizzly bear has a negative impact on the bear, and it will not return to the site at which it was trapped. Dr. Pearson also testified that "each translocation must be judged on its own merits as to whether it is successful" (T. Vol. XIV, p. 1508, l. 19-20) and that based on the knowledge that was available he thought it was reasonable to transplant the bear to Gibbon Meadows, and that the transplant was successful. It was his opinion that the bear was in her normal grizzly habitat at the time of the accident.

The foregoing is only a brief resume of the transcript which comprises 1745 pages, and relates particularly to the exercise by the Government employees of their discretionary functions and duties with respect to bear management.

The parties agree that this court is bound by Judge Hauk's findings of fact unless we find them to be clearly erroneous. In determining whether findings of fact are or are not clearly erroneous, we look to the teaching of *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948), where it is stated:

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The Federal Tort Claims Act, 28 U.S.C. § 2680(a) provides:

> The provisions of this chapter and section 1346 (b) of this title shall not apply to—
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> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

We are convinced that the acts of the Park Service or Interior Department employees which Dr. Craighead said constituted negligence are within the protection of 28 U.S.C. § 2680(a) and the discretionary function rule enunciated in *Dalehite v. United States*, 346 U.S. 15, 73 Sup. Ct. 956, 97 L. Ed. 1427 (1953). That case held that various decisions with respect to instituting a fertilizer export program, conducting further experiments regarding the combustibility of the fertilizer, and decisions regarding bagging temperature, bag

labelling, fertilizer coating and bagging material were all made at a planning rather than operational level. The case specifically states that "all employees exercising discretion" are covered by the Act. *Id.* at 33. The summary of the record shows that the decision to abruptly close the garbage dumps was likewise made at the planning level. Superintendent Anderson, who issued the regulations and who made the decisions of which plaintiff and Dr. Craighead complain, was making a policy judgment. Even Dr. Craighead agreed at the trial that the handling of bears is a matter of judgment and someone must apply it. Similarly, we believe that the measures taken to prevent human-bear contact at this time were discretionary, as was the decision to transplant bear No. 1792 to Gibbon Meadows, 18 miles north of the Old Faithful area.

We do not believe it was the intention of Congress in enacting 28 U.S.C. § 2680(a) to fasten liability upon the defendant for its handling of bears generally or sow 1792 in particular when such discretion is exercised reasonably, after investigation, consultation, and reports by qualified experts in the field. It was not the intention of the Congress as we read the Federal Tort Claims Act and the enactments relating to Yellowstone Park, to make the defendant, United States of America, an insurer of the safety of all Yellowstone National Park visitors. Approval of the trial judge's findings and order would, in effect, do that. We should also note that our conclusions here find support in *Rubenstein v. United States,* 338 F. Supp. 654 (N.D. Cal. 1972), a decision by Judge Spencer Williams which was affirmed by a panel of this court in 488 F. 2d 1071.

We would further comment that it is clear that these two young men disregarded the advice and the warnings of Miss Searer and intentionally failed to go to the Ranger Station or the Visitors' Center. Thus they avoided receiving warnings about bears, both grizzly and black. It is clear that they camped in an area which they knew was unauthorized. All of the warnings which the Park Service could devise will do no good as to persons such as decedent and Bradberry who, in effect, refuse to put themselves in contact with persons from whom they would receive advice, including warnings, and by whom they would be told not to camp at a place they seemed determined to camp.

We again note that the two young men disregarded the warnings they did receive. To require the Park Service to post signs and warnings on every boardwalk, path or trail every few hundred feet throughout a park as extensive as Yellowstone would not only be prohibitive in cost but would destroy the park's beauty as well. To require the Park Service to search out from among the 25,000 daily visitors on the days decedent and Bradberry were in the park those two and any others who had entered the park without paying and without receiving the warning bulletins and to hold that failure to warn such individuals is actionable negligence is for the Congress and not for the courts. To date, as we read the Federal Tort Claims Act and the acts relating to Yellowstone in particular, and other national parks generally, the Congress has not intended such broad coverage. Fortunately there are but few who, like decedent and Bradberry, come in without paying the required fee and attempt to

avoid receiving the services and advice, including warnings, which the Park Service provides. We find there is no credible evidence to support the trial judge's findings that the Park Service willfully failed to warn decedent of a dangerous condition. Instead, the trial court could well have found that the decedent willfully disregarded the warnings he was given.

We would also note that in 1973 the Wyoming legislature passed a comparative negligence law which has been determined not to be retroactive. Therefore, the previous contributory negligence rule of Wyoming, which would bar recovery by decedent if there was any negligence on his part, is applicable in this case. The above recited facts show such contributory negligence and do not need to be repeated here.

This case is reversed and remanded with directions to the trial court to enter an order dismissing the complaint at the costs of the plaintiff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE TRIAL COURT IN THIS CASE.

Modified Findings of Fact and Conclusions of Law and Order for Judgment.

United States District Court, Central District of California.

Dennis G. Martin, as Administrator of the Estate of Harry Eugene Walker, Deceased, Plaintiff, v. United States of America, Defendant. Civil No. 72-3044-AAH.

Filed: April 4, 1975

Upon the Court's own motion, and the Defendant United States of America having on March 31, 1975, filed its OBJECTIONS TO PLAINTIFF'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT, one day within the two week time period after Plaintiff lodged his FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT on March 18, 1975, all as ordered by the Court on February 24, 1975; and

The Court having inadvertently signed and entered Findings of Fact and Conclusions of Law and Order for Judgment herein on March 26, 1975, prior to the receipt of Defendant's said OBJECTIONS; and

GOOD CAUSE APPEARING THEREFOR, the Court now makes, signs and orders entered the following Modified Findings of Fact and Conclusions of Law and Order for Judgment, after having fully considered defendant's said OBJECTIONS:

On December 20, 1972, a complaint under the Federal Tort Claims Act, being 28 U.S.C.A. Section 2671,

et seq. and 28 U.S.C.A. Section 1346b, having been filed in this Court against the United States of America as defendant, by Dennis G. Martin, Administrator of the Estate of Harry Eugene Walker, Deceased, pursuant to Letters of Administration duly issued to said Dennis G. Martin by the Superior Court of the State of California, County of Los Angeles, case number EAP-9456, Zetterberg & Zetterberg, and Stephen E. Zetterberg, attorneys for plaintiff, claiming damages for the wrongful death of Harry Eugene Walker, on behalf of the surviving mother and father and three sisters of said decedent, Harry Eugene Walker; and

On or about September 14, 1972, the defendant United States of America having appeared by William D. Keller, United States Attorney, Frederick M. Brosio, Jr., Assistant United States Attorney, Chief, Civil Division, and William B. Spivak, Jr., Assistant United States Attorney, and said defendant United States of America having answered, and the Court having heard and disposed of all motions and pre-trial proceedings, and the case having been brought to issue; and, the case having duly come on for trial before this Court, the Honorable A. Andrew Hauk, Judge presiding, on January 9, 1975, before the Court without a jury pursuant to the Federal Tort Claims Act, testimony having been taken January 9 through January 17, 1975, and the case having been recessed, and further testimony having been taken February 18 through February 24, 1975, evidence, oral, written, and documentary, having been introduced, and defendant United States of America having submitted evidence offered in behalf of its defense, and the parties having rested, and due deliberation having been had thereon by the Court:

I DO DECIDE AS FOLLOWS:

FINDINGS OF FACT

1. Decedent Harry Eugene Walker, age twenty-five on the date of his death, was killed by a grizzly bear on the night of June 24-25, 1972, while camping in the Old Faithful Subdistrict of Yellowstone National Park, State of Wyoming, United States of America.

2. Defendant owned, operated and maintained said National Park as a place to which members of the public, including decedent, were invited for recreational purposes, to the benefit of defendant.

3. Defendant's Rangers on duty when the decedent entered the Park at the north entrance of Yellowstone National Park permitted the decedent to enter without paying the usual admission charge.

4. In particular, defendant invited and encouraged many people, including decedent, to camp within the confines of the Park, both within improved campgrounds and in backcountry, and defendant knew that many people did, at and before the date of decedent's death, in fact, camp and sleep out in the backcountry areas of the Park, and in the country in and adjacent to the developed area at Old Faithful, in the Old Faithful Subdistrict of the Park.

5. Defendant, through its various grizzly bear control programs, exerted control over the behavior of grizzly bears, including the particular bear that killed decedent, in that it could and did exert control over the number of bears, the ranges of the bears, including the bear that killed decedent, their diet, and the relative danger they posed to Park visitors.

6. Prior to decedent's death, defendant had abruptly closed backcountry garbage dumps, including Rabbit

Creek garbage dump, about four miles from the Old Faithful developed area. This and other such garbage dumps had been used by grizzly bears for years as a part source of food. Defendant knew, from partial dump closures in 1968 and 1969, and from dump closures thereafter, that abrupt closure of the garbage dumps was an extremely hazardous activity. Defendant had been previously warned that if it carried out such abrupt closure, there could be a resulting visitor death from grizzly bear attack.

7. It was the duty of the defendant and its employees at Yellowstone National Park to warn all visitors, including decedent, of park dangers known to the defendant. Whether the decedent be said to be a business invitee, a business licensee, a business visitor, or a gratuitous licensee, the defendant at all times had a duty of warning him and all other persons in Yellowstone Park of hidden dangers and of dangers of camping or sleeping or walking near to and including the area where the body was found, which the Court finds was within a developed area. The defendant had knowledge, prior to and at the time of decedent's death, that backpackers and hitchhikers were in the Old Faithful area, including the developed area, sleeping out at night. Warnings could have been made of the grizzly bear dangers to such campers resulting from the program of abrupt closing of garbage dumps undertaken by defendant. Such closing imposed an extra hazard of grizzly bear danger to campers and backpackers sleeping out in such area. Warnings could have been made by signs, and signs could have been made pointing to campgrounds and campsites within a reasonable distance. The Park willfully and intentionally failed

to provide such warnings and place such signs despite the minimal cost thereof.

8. Furthermore, prior to 1968, the brothers Dr. Frank C. Craighead and Dr. John J. Craighead, through studies sponsored by many institutions, including the National Geographic Society, the National Science Foundation, and others, through the Montana Cooperative Wildlife Research Unit at the University of Montana, and by the Environmental Research Institute, by independent research conducted in Yellowstone National Park commencing in 1959, had developed a system of radio monitoring grizzly bears instrumented with radio collars, and of visually tagging grizzly bears, so that the habits, ranges, and movements of grizzly bears could be observed. The defendant, under the administration of Superintendent Anderson commencing in Yellowstone in 1968, willfully and intentionally stopped all of such radio monitoring and tracking as recommended by the Craigheads, and contrary to the defendant's own so called "Leopold" report, discontinued monitoring and visual tracking, and willfully and intentionally removed devices recommended by the Craigheads for such monitoring, despite evidence which showed that radio monitoring devices could have been furnished and installed for between $3,000 and $6,000. The evidence shows that the defendant's administration at Yellowstone National Park, instead of discontinuing the monitoring plan, should have radio monitored bears which were trapped for transplanting, including the bear trapped in 1970, identified as number 1792, which killed Harry Walker in 1972. The evidence showed increased grizzly bear activity in and around the developed areas of Yellowstone National Park, which had

been near the garbage dumps which were closed. It was negligent on the part of the defendant, at the time it undertook the extra hazard of closing down the garbage dumps, willfully and intentionally to discontinue radio and visual monitoring as recommended both by the Craighead brothers and by defendant's "Leopold" committee. Defendant's own reports, including the report prepared for the defendant by the National Academy of Sciences, showed that before the stopping of radio monitoring and of identifiable visual color markings which had been used by the Craigheads in grizzly studies before the Park administration changed in 1968, information and statistics on grizzly bear activities were more reliable and better than those available after the system was curtailed, starting in 1968. The defendant should have allowed independent research on the grizzly bear such as had been conducted by the Craighead brothers prior to 1968. The need for continued research was confirmed by the study made for the defendant by the National Academy of Sciences, which in July, 1974, reported that the research program carried out by the National Park Service administration since 1970 has been inadequate to provide the data essential for devising sound management policies for grizzly bears in the Yellowstone ecosystem.

9. The defendant adopted the "abrupt" program for closing of the dumps, rather than following the "phasing out" closure procedures as recommended by Dr. Frank Craighead. Both Dr. Craighead, and the "Leopold" committee appointed by the defendant, had recommended supplementary "carrion feeding" of the bears in the backcountry as a procedure which should have been adopted during the phasing out of the garbage dumps.

10. The bear that killed decedent, number 1792, was an old female, with worn and broken teeth, that had been captured and trapped in, and transplanted approximately 18 miles from, the developed area of the Old Faithful Subdistrict of Yellowstone National Park, by agents and rangers of the defendant, on about October 14, 1970. When the defendant trapped grizzly bear number 1792, it failed to transfer the bear a sufficient distance, considering grizzly bear homing instincts of which defendant had knowledge, to return to the Old Faithful area. The bear did again visit the area, where it killed the decedent. The Park Service at Yellowstone could and should have removed the bear a sufficient distance so that she would not have come back.

11. Defendant failed to exercise due care toward decedent in the following respects:

a. Defendant failed to provide decedent and other Park visitors adequate warnings about the dangers posed by grizzly bears, which defendant knew to be dangerous animals within the Park.

b. In carrying out its program of grizzly bear management and control, defendant abruptly closed garbage dumps in Yellowstone National Park at which grizzly bears formerly fed, thus negligently creating an unreasonable danger to Park visitors, including decedent, from grizzly bears, including this grizzly bear.

c. Defendant failed to take adequate precaution to mitigate the extreme danger created by abrupt closure of the garbage dumps, and failed to warn visitors, including decedent, of the special danger, although it could and should have done so at minimal cost and expense to it.

d. Defendant was aware of the dangers of grizzly bears to Park visitors. Defendant, knowing such dangers, did undertake some inadequate precautions, but such precautions were carelessly and faultily planned, and negligently executed.

e. In 1970 defendant captured the particular bear that later killed decedent. Defendant then had knowledge that the bear was dangerous to visitors and was likely to return to the Old Faithful Subdistrict, but negligently failed to transplant the bear an adequate distance or to eliminate it from the grizzly bear population in Yellowstone National Park, in particular the Old Faithful Subdistrict thereof, including the developed area in and around Old Faithful Village.

Defendant was negligent in that it failed to act with reasonable prudence, considering the information available to it, concerning the particular bear that killed Harry Eugene Walker. Prior to the capture and transfer of this particular grizzly bear in October of 1970, it had been seen four to six times in the developed area of Old Faithful Village near a garbage holding area behind a restaurant, in an area frequented by humans, thus displaying dangerous lack of respect for humans. Moreover, when the bear was captured in October, 1970, it was an old female grizzly; Dr. Frank Craighead testified that it would have been prudent to examine the bear's teeth, which in 1972 were found to be worn; the bear was less able to be competitive for food with younger and stronger bears, and therefore more likely to invade camp areas in search of food, making the bear unreasonably dangerous to humans. Further, at the time of its capture, defendant had knowledge that in late August or early September, 1970, along the Fire Hole River near the Old Faithful

Developed area, a campsite had been destroyed by a bear, the owner of the campsite was missing, and never found, and the defendant rangers had determined the campsite had likely been destroyed by a bear, possibly a grizzly bear, but negligently failed to act with reasonable prudence in that defendant failed to consider the possibility that the bear which destroyed the said Fire Hole River Camp prior to October, 1970, could have been the bear which was trapped and transplanted in 1970, and which later killed Harry Eugene Walker.

12. As a sole, direct, and proximate result of each of the negligent acts and omissions of defendant, taken individually and together, including and as a direct and proximate result of the activity of abrupt closing of garbage dumps, and as a direct and proximate result of defendant's failure to avert an attack on the decedent by prudent control action on the grizzly bear which killed decedent, and as a direct and proximate result of the failure of the defendant and its employees to warn decedent of danger known to them but unknown to him, to wit, the danger of grizzly bears in Yellowstone National Park, and particularly in the Old Faithful Subdistrict and Old Faithful Village area of Yellowstone National Park, Harry Eugene Walker's death was caused.

13. The decedent was not contributorily negligent, and did not directly or indirectly contribute to the cause of his own death.

14. Decedent was trained and experienced in dairying, and particularly in operating the family dairy in Alabama, and plaintiffs had a reasonable expectation that he would operate the family dairy farm with

his father, and manage and operate the farm on his father's illness and retirement, and his death caused the family, and each member thereof, loss of support, care, comfort, advice, society, and nurture in the amount hereinafter found as damages.

15. The practice of this part of Alabama was for dairies to be run in family partnership, including parent and son, or sons, and the decedent and his father had an understanding and agreement to so operate the dairy farm owned by decedent's mother and father.

16. Decedent's heirs entitled to recover damages for the wrongful death of Harry Eugene Walker are his father, Wallace R. Walker, his mother, Jessie Louise Walker, and his younger sister, Jenny Lynn Walker, who at the time of his death, and at the time of trial, was living at home. I make no award to decedent's older sisters, Betty Simmons and Caroline Crowe, since they had left home and established their own families prior to his death.

17. The family is entitled to recover burial expenses, loss of support, and loss of care, comfort, advice, society, nurture, in the proportion suffered by each. I find that the total damages suffered by the family to be: $1,217.67 paid by the father for burial expenses; $61,200.00 for loss of support, and $25,000.00 for non-pecuniary losses, totalling $87,417.-67, plus costs, allocable as follows:

a. To the father, Wallace R. Walker, the sum of two-fifths (2/5th) of $61,200.00, that is, the sum of $24,480.00, plus $1,217.67 burial, plus $10,000.00 non-pecuniary loss, for a total of $35,697.67;

b. To the mother, Jessie Louise Walker, the sum of two-fifths (2/5th) of $61,200.00, that is the sum

of $24,480.00, plus $10,000.00 non-pecuniary loss, for a total of $34,480.00;

c. To the sister, Jenny Lynn Walker, the sum of one-fifth (1/5th) of $61,200.00, that is, the sum of $12,240.00, plus $5,000.00 non-pecuniary loss, for a total of $17,240.00.

18. The plaintiff, Dennis G. Martin, is a resident of the State of California, and of the Central District of California for the County of Los Angeles, and of the Estate of Harry Eugene Walker, Deceased, appointed by order of the Superior Court of the State of California for the County of Los Angeles, and the judgment should be paid to him, to receive and disburse the funds in order to carry out the terms of the findings and the judgment.

19. Any Conclusions of Law deemed to be a Finding of Fact are hereby incorporated in the foregoing Findings of Fact.

CONCLUSIONS OF LAW

1. Defendant United States of America, in its administration of the National Park Service in Yellowstone National Park, was negligent, and failed to exercise due care towards the decedent, Harry Eugene Walker, in each of the several respects hereinabove specifically set forth in the findings of fact.

2. The negligence of the defendant, United States of America, was the sole, direct, and proximate cause of the death of Harry Eugene Walker on the night of June 24-25, 1972.

3. The decedent Harry Eugene Walker was not contributorily negligent and did not directly or indirectly contribute to the cause of his death.

4. The defendant has failed to establish any affirmative defense to plaintiff's action for wrongful death.

5. Plaintiff should have judgment in the amount of damages fixed by the Court in the foregoing Findings of Fact, and for costs.

6. Any Findings of Fact deemed to be Conclusions of Law are hereby incorporated in the foregoing Conclusions of Law.

LET JUDGMENT BE ENTERED FOR PLAINTIFF IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Dated: April 4, 1975

/s/ A. Andrew Hauk
A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

EXHIBIT 42, STARKER-LEOPOLD COMMITTEE REPORT.

A Bear Management Policy and Program for Yellowstone National Park

A report to the Director by the Natural Sciences Advisory Committee of the National Park Service, as a result of a meeting in Yellowstone National Park, September 6 and 7, 1969.

A. Starker Leopold, Chairman
Stanley A. Cain
Charles E. Olmsted

PREAMBLE

Yellowstone has an estimated population of about 250 grizzly and 500 black bears. Management goals, consonant with the administrative policies of the National Park Service, may be summarized as follows:

1. To maintain populations of grizzly and black bears at levels that are sustainable under natural conditions as part of the native fauna of the Park.
2. To plan the development and use of the Park so as to minimize conflicts and unpleasant or dangerous incidents with bears.
3. To encourage bears to lead their natural lives with minimum interference by humans.

The present meeting was called because, in fact, the above goals of bear management have not been fully met. A long history of dumping garbage and refuse in open pits has attracted many grizzly bears and substantially altered their natural wild habits. Inadequate trash cans in earlier years became habitual

sources of food for both grizzly and black bears, and this in turn led to the bears learning to raid food sources in camps and automobiles. Roadside feeding of black bears by visitors, while against Park regulations, has persisted to the extent that many individual bears have become confirmed panhandlers. Personal injuries and cases of property damage are occurring with such frequency that a number of bears have had to be destroyed. The problem has assumed critical significance—legal, political, and otherwise. The National Park service must act decisively to correct this state of affairs. The report which follows suggests a possible sequence of management steps to begin rehabilitating the bears to a wild, natural existence.

This Advisory Committee does not pretend specific competence in judging the ethology and psychology of bears. However, we had the advantage of published and verbal testimony of experienced park administrators and bear biologists including the following Consultants for our Yellowstone meeting: John and Frank Craighead, Albert Erickson, and Frederick C. Dean. The recommendations here presented were distilled from the collective testimony of all who contributed to the meeting.

PROCEDURES

1. *Garbage disposal*

The ultimate objective agreed upon by all participants, is the incineration or sanitary disposal of trash and garbage in a manner that will completely isolate this food source from bears. Ideally all refuse should be hauled out of Yellowstone National Park for incineration and burial. Future plans for such a program of disposal are being considered now.

But in the meantime, there is disagreement as to the sequence of steps leading to the elimination of garbage from availability to grizzlies. One view is to cut off all garbage quickly, forcing the bears to turn immediately to natural foods. The opposite contention is to phase out garbage feeding over a period of time, "weaning" the bears gradually. The issue hinges on which of these procedures will result in the least number of bears going into camp grounds. Unfortuantely, prognosticating how garbage-fed grizzlies will respond to deprivation depends on judgment rather than data. Much is known about the habits of garbage bears and of wild-living bears, but little is known about the process of transition. In any event, the transition must be made, and everything possible done to protect both park visitors and the population of bears during the process.

Practical budgetary limitations have precluded immediate elimination of garbage. But a start has been made in sorting refuse at Trout Creek Dump and incinerating combustibles. This has led to a modest decrease in grizzly use, with a corresponding increase in bear visitations to Rabbit Creek Dump. There has been an apparent increase in grizzly visitations to camp grounds in the central portion of Yellowstone and increased control of troublesome bears (killing as well as trapping). When Trout Creek dump is completely closed, how will the grizzlies respond? And what will transpire when the other dumps are closed as well?

On the assumption that one reaction of some of the bears will be to gravitate into camp grounds, we suggest the following list of camp ground protection practices.

2. *Camp ground protection practices*

a. *Intensified Sanitation*—All trash cans at campgrounds and along roads are now bear-proofed. But there should be increased emphasis on maintaining clean camping areas. Every known procedure and device should be employed to eliminate all smells or materials that might attract bears.

b. *Public education and patrol*—Much emphasis should be added to the information campaign about camp sanitation and security. Road signs, printed handouts, verbal instruction at campfire programs, and enforcement of camp ground regulations should be intensified to assure maximum cooperation of the public. Campers require repeated admonitions to store food in plastic containers, locked in their automobiles.

c. *Patrol.*—Trained and equipped night patrolmen in automobiles should be assigned to all campgrounds where bear troubles are imminent. Their function would be to urge and enforce sanitation procedures, to detect the presence of bears in campgrounds, to discourage them in every possible way short of inciting anger, and to radio for help if a bear requires removal by drug or other means.

d. *Scare devices.*—The Park Service should be testing every possible device to keep bears away from campgrounds—sonics, lights, mace or other gases, repellent odors, etc. These tests should not be conducted at a campground but rather at some isolated point with bait of some kind (carrion, for example).

e. *Bear fencing.*—Experimental fencing should be tested to seek a bear proof combination. Link fence enclosed with parallel electric wires—one high, one low—might be a combination to try. Such drift fence

placed across areas where bears gain access to campgrounds might deflect the bear traffic. Funnel exit gates should be provided to permit bears to leave the enclosed area if they should happen to get inside.

f. *Carrion feeding.*—As a substitute for garbage, carrion might be placed to draw bears away from campgrounds. Dropped by helicopter in outlying districts, the carcasses of surplus beasts (emaciated park ungulates, slaughter house surpluses, etc.) may help reduce the concentration of grizzlies around areas occupied by people, particularly during the transition period of closing the dumps.

g. *Closing campgrounds.*—If necessary, campgrounds situated in the vicinity of garbage dumps could be closed during the transition period.

h. *Relocation of campgrounds.*—On a longer scale, the location of all campgrounds should be re-examined to see if some may be poorly located from the standpoint of bear visitation. Even long after the garbage problem is resolved, some camp areas may naturally attract passing bears. These had best be moved.

3. *Study of bear reaction to garbage removal*

To guide the development of the bear management program, each succeeding step should be studied concurrently to note reaction of the bears. Investigations should concentrate particularly on the following:

a. *Movements of bears* already marked or instrumented. Many bears around Trout Creek Dump have been captured and marked. Response of these individuals to elimination of garbage will suggest what problems may arise as other garbage sources are removed.

b. Recording *numbers and density of bears* at all dumps as food sources are pinched off.

c. Monitoring *human contacts* with grizzlies, both threatening and casual, at camp grounds and elsewhere during this transition.

It is to be emphasized that these studies are merely adjuncts to an active management program and are no substitute for continuing, long-term research on the grizzly (mentioned later).

4. *Dealing with troublesome bears*

Despite all precautions, safeguards, and discouragements, some bears will doubtless persist in visiting campgrounds. Initial treatment of these animals is trapping and transplanting. If this procedure fails, and the individual animals prove to be a continuing threat to human lives or property they may have to be destroyed.

a. *Transplanting bears.*—When a troublesome bear is transplanted, every possible effort should be made to make the *initial transplant* succeed. If the first release is in wild but hospitable terrain, far from human habitation, the animal may be successfully acclimated, particularly a young animal. In the past, many trapped bears have been released at convenient points near roads or border stations, where they quickly gravitate back to camp searching. Helicopter transport, though costly, may be one effective way to assure successful transplantation.

b. *Destroying incorrigible bears.*—In the past ten years, the Yellowstone Park Administration has felt obligated to destroy about 30 black bears and 4 grizzly bears per year. If present plans succeed in eliminating

the linkage between bears and human sources of food, this program may drop ultimately almost to zero. But in the transition period the Park should be prepared to eliminate bears that prove to be incorrigible and dangerous to human life. Hopefully, the number will be few and hopefully the men making decisions will take the right animals at the right time and will spare individuals that are capable of rehabilitation. The bodies of such animals as killed should be fully utilized for scientific purposes.

These steps are fully in accord with administrative policies which state that animal control, when necessary shall be undertaken as follows: (1) live-trapping for transplanting elsewhere; (2) scientific research specimens; and (3) direct reduction by National Park Service personnel.

5. *Continuing Research*

During the past 11 years, the grizzly population of Yellowstone has been under continuous study by John and Frank Craighead. A number of publications and reports, including a 113-page report, *Management of Bears in Yellowstone National Park,* have been made available to the National Park Service and other agencies administering grizzly populations. Much data on grizzly bear biology accumulated in this study are as yet unpublished due to the long-term nature of the research. Early publication is urged.

Additional studies have been undertaken in more recent years of both grizzly and black bears in the northern Rocky Mountain region. These investigations should be supported and extended. For example, surveys of the grizzly populations in Wyoming and Montana *outside* of the national parks should be undertaken

jointly by interested state and federal agencies. All possible data should be derived from bears killed during legal hunting seasons. Studies of bear/human contacts undertaken in Glacier and Yellowstone Parks should be continued and extended. A successful future management program of wild bears will call for all the information that can be assembled.

6. *Financing the bear program*

The emergency program of bear management suggested here cannot be funded out of regular appropriations for Yellowstone Park. Garbage elimination, manpower, helicopter rental, automobile patrol, and experimental materials for fencing or repelling bears will call for a special supplementary budget from the National Park Service. We urge the Director to seek emergency funds for this purpose and to implement plans now for the period of bear emergence from winter quarters in the spring of 1970. An estimate of costs should be obtained from the Superintendent of Yellowstone National Park.

Attending September 6 meeting in Yellowstone
Natural Sciences Advisory Committee

Dr. A. Starker Leopold (Chairman), University of California
Dr. Stanley A. Cain, University of Michigan
Dr. Charles E. Olmsted, University of Chicago
Mr. Sigurd Olson, Ely, Minnesota (absent)

Special Consultants

Dr. Frank C. Craighead, Jr., Moose, Wyoming
Dr. John J. Craighead, University of Montana
Dr. Frederick C. Dean, University of Alaska
Dr. Albert Erickson, University of Minnesota

National Park Service Personnel

Mr. George B. Hartzog, Jr., Director, WASO
Mr. Harthon L. Bill, Deputy Director, WASO
Dr. Robert M. Linn, Chief Scientist, WASO
Mr. Neil J. Reid, Wildlife Management Specialist, WASO
Mr. Lowell Sumner, Consultant-Collaborator, WASO
Mr. Jack K. Anderson, Superintendent, Yellowstone
Mr. Glen F. Cole, Supv. Research Biologist, Yellowstone
Dr. Douglas B. Houston, Research Biologist, Grand Teton
Mr. William J. Barmore, Research Biologist, Yellowstone
Miss Margaret M. Meagher, Research Biologist, Yellowstone
Mr. Richard G. Prasil, Management Biologist, Alaska Field Office.

APPENDIX.

Wyoming Statutes, 1975 Cum. Supplement.

CHAPTER 21.1.
LIABILITY OF OWNERS OF LAND USED FOR RECREATION PURPOSES.

§ 34-389.1. *Definitions.*—As used in this act [§§ 34-389.1 to 34-389.6]:

(a) *"Land"* means land, roads, water, watercourses, private ways and buildings, structures, and machinery or equipment when attached to the realty.

(b) *"Owner"* means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.

(c) *"Recreational purpose"* includes, but is not limited to, any of the following or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites.

(d) *"Charge"* means the admission price or fee asked in return for invitation or permission to enter or go upon the land. (Laws 1965, ch. 9. § 1.)

§ 34-389.2. *Landowner's duty of care or duty to give warnings.*—Except as specifically recognized by or provided in section 5 of this act [§ 34-389.5], an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes. (Laws 1965, ch. 9, § 2.)

§ 34-389.3. *Limitations on landowner's liability.*—Except as specifically recognized by or provided in section 5 of this act [§ 34-389.5], an owner of land who either directly or indirectly invites or permits without charge any person to use such property for recreational purposes does not thereby:

(a) Extend any assurance that the premises are safe for any purpose.

(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

(c) Assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons. (Laws 1965, ch. 9, § 3.)

§ 34-389.4. *Application to land leased to state or political subdivision thereof.*—Unless otherwise agreed in writing, the provisions of sections 2 and 3 of this act [§§ 34-389.2 and 34-389.3] shall be deemed applicable to the duties and liability of an owner of land leased to the state or any subdivision thereof for recreational purposes. (Laws 1965, ch. 9, § 4.)

§ 34-389.5. *When landowner's liability not limited.*—Nothing in this act [§§ 34-389.1 to 34-389.6] limits in any way any liability which otherwise exists:

(a) *Failure to warn against dangerous condition.*—For willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity.

(b) *Where landowner charges for entry.*—For injury suffered in any case where the owner of land charges the person or persons who enter or go on the land for the recreational use thereof, except that in the

case of land leased to the state or a subdivision thereof, any consideration received by the owner for such lease shall not be deemed a charge within the meaning of this section. (Laws 1965, ch. 9, § 5.)

§ 34-389.6. *Duty of care, etc., not created; duty of care of persons using land.*—Nothing in this act [§§ 34-389.1 to 34-389.6] shall be construed to:

(a) Create a duty of care or ground of liability for injury to persons or property.

(b) Relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this act to exercise care in his use of such land and in his activities thereon, or from the legal consequences of failure to employ such care. (Laws 1965, ch. 9, § 6.)

APPENDIX

CHARTS FROM BIOSCIENCE

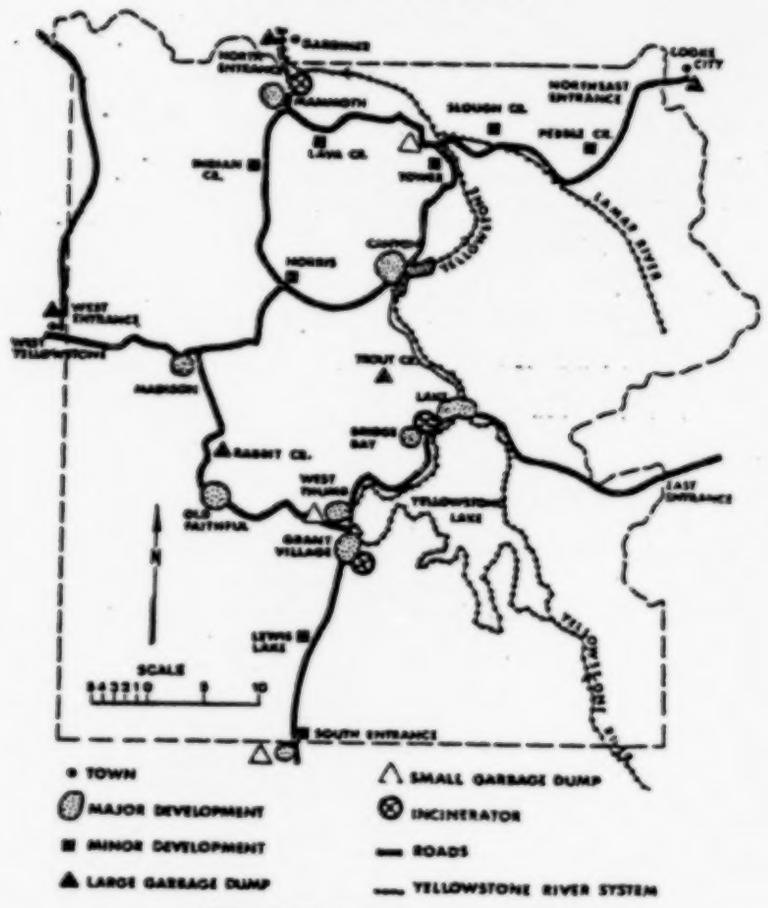

Fig. 1 Map of Yellowstone National Park showing developed areas, garbage dumps, and incinerators.

Fig. 2 Frequency of capture and number of grizzly bears captured in campgrounds.

"Grizzly Bear - Man Relationships in Yellowstone National Park," BioScience Vol. 21, No. 16

Supreme Court, U. S.
FILED
JUN 8 1977
MICHAEL RODAK, JR., CLERK

No. 76-1421

In the Supreme Court of the United States

OCTOBER TERM, 1976

DENNIS G. MARTIN, ADMINISTRATOR OF THE ESTATE OF HARRY EUGENE WALKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-12) is reported at 546 F. 2d 1355. The opinion of the district court (Pet. App. A-13 to A-24) is reported at 392 F. Supp. 243.

JURISDICTION

The order of the court of appeals was entered on December 3, 1976, and a timely petition for rehearing was denied on January 14, 1977. The petition for a writ of certiorari was filed April 14, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether recovery by petitioner is barred by the decedent's contributory negligence.

2. Whether recovery is barred by the "discretionary function" exception to the Federal Tort Claims Act.

STATEMENT

On June 22, 1972, Harry Eugene Walker and Phillip Bradberry hitchhiked into Yellowstone National Park in the car of Vikki Searer, an employee of a Park concessionaire.[1] Because the car bore a sticker identifying the employee, it was waved through the entrance, and as a result the hitchhikers paid no entrance fee and did not receive the brochures distributed to park visitors on entry.[2] A large map, approximately 5 feet by 7 feet, posted at the entrance, depicted designated camping areas and carried the notice that "[o]vernight stopping [is] permitted only in designated campgrounds."

Searer told Walker and Bradberry, in response to their inquiry, that they would need a permit to camp and that they should go to the Ranger Station to obtain a permit. Persons who apply for such permits receive a pamphlet entitled "In Grizzly Country," a list of designated campgrounds, and a brochure on "Campground Management," and if their camping abilities warrant they are issued a back country permit and assigned to a particular site patrolled by rangers.

Walker and Bradberry did not, however, go to the Ranger Station. Instead, they found an unauthorized and isolated

[1]The facts are taken from the opinion of the court of appeals (Pet. App. A-3 to A-12).

[2]These brochures include a map of Yellowstone Park that warns of bears and other wildlife; a red folder entitled "Danger," that contains further warnings of bears; and a pamphlet about bears, entitled "Enjoy Them at a Distance," that provides specific information on how to avoid attracting bears to a campsite.

place to camp near the Old Faithful geyser.[3] They brought Searer to the campsite on June 23, and she warned them that they were in an unauthorized campsite and they would "catch hell" if caught. On the evening of June 24, the two men visited Searer at the Old Faithful Inn, where she worked. As they returned to the campsite that night, Walker was attacked by a bear and killed. The next day rangers trapped and killed a sow grizzly, No. 1792, at the campsite.

Petitioner, the administrator of Walker's estate, then brought this action for wrongful death in the United States District Court for the Central District of California, alleging negligent management of bears in the park and inadequate warnings to campers. After trial, the district court entered judgment of $87,417 for the plaintiff (Pet. App. A-13 to A-24). The court found that in 1970 and 1971 the Park Service had erred in abruptly closing garbage dumps, where bears had fed, in a manner that allegedly led the bears to rummage for food at campsites, and also that the Service had negligently failed to give Walker adequate notice of the dangers posed by the bears.

The court of appeals reversed and remanded with instructions to dismiss the complaint (Pet. App. A-12). The court held that the decision to close the garbage dumps was made at the planning rather than the operating level and therefore was within the discretionary function exception to

[3]Signs posted in that area warned visitors to stay on boardwalks due to the danger of thermal features (Exh. 5, p. 13). Despite these warnings, Walker and Bradberry left the boardwalks and pitched camp a considerable distance into the forest.

the Federal Tort Claims Act, 28 U.S.C. 2680(a).[4] The court further concluded that the district court's finding that Walker had not been contributorily negligent was clearly erroneous (Pet. App. A-9, A-12).[5]

ARGUMENT

1. Under the Federal Tort Claims Act, the United States can be held liable only if a "private person" similarly would be liable "in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). The court of appeals was correct in ruling that, on the evidence as presented to the district court, Walker was contributorily negligent and that, under Wyoming law in effect at the time of his death, his contributory negligence barred recovery

[4]28 U.S.C. 2680(a) provides:

> The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

[5]Although the court of appeals did not expressly state that the finding of inadequate warnings was clearly erroneous, such was the clear import of its opinion (Pet. App. A-11):

> To require the Park Service to post signs and warnings on every boardwalk, path or trail every few hundred feet throughout a park as extensive as Yellowstone would not only be prohibitive in cost but would destroy the park's beauty as well. To require the Park Service to search out from among the 25,000 daily visitors on the days decedent and Bradberry were in the park those two and any others who had entered the park without paying and without receiving the warning bulletins and to hold that failure to warn such individuals is actionable negligence is for the Congress and not for the courts.

(Pet. A-11 to A-12). As the court of appeals stated (Pet. App. A-11):

> * * * [I]t is clear that these two young men disregarded the advice and the warnings of Miss Searer and intentionally failed to go to the Ranger station or the Visitors' Center. Thus they avoided receiving warnings about bears, both grizzly and black. It is clear that they camped in an area which they knew was unauthorized. All of the warnings which the Park Service could devise will do no good as to persons such as decedent and Bradberry who, in effect, refuse to put themselves in contact with persons from whom they would receive advice, including warnings, and by whom they would be told not to camp at a place they seemed determined to camp.

The factual determination of contributory negligence constitutes an independent basis for the judgment below, and that determination plainly does not warrant review by this Court.[6]

2. The court of appeals correctly held that recovery is barred by the exception in the Tort Claims Act for discretionary functions. That decision does not conflict with decisions of this Court or of other courts of appeals.

[6]Petitioner's argument (Pet. 38-42) that the court of appeals misapplied Rule 52, Fed. R. Civ. P., in holding that the factual findings of the district court were clearly erroneous is without merit. The court of appeals expressly followed this Court's teachings in *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395, and found, as that case requires, a "definite and firm conviction that a mistake has been committed" (Pet. App. A-8 to A-9).

Similarly, petitioner's argument (Pet. 42-47) that the federal government owes the same duty of care under Wyoming law to all park visitors, whether they pay an entrance fee or not, is irrelevant in light of the court of appeals' decision that recovery is barred by contributory negligence.

The policy implemented in Yellowstone National Park with respect to the garbage dumps at which the bears had been feeding was a judgmental decision by National Park Service and Interior Department officials and falls squarely within the statutory exception for discretionary functions. See *Dalehite* v. *United States*, 346 U.S. 15; *Rubenstein* v. *United States*, 338 F. Supp. 654 (N.D. Cal.), affirmed, 488 F. 2d 1071 (C.A. 9); *Ashley* v. *United States*, 215 F. Supp. 39 (D. Neb.), affirmed on other grounds, 326 F. 2d 499 (C.A. 8). In *Dalehite*, the Court denied recovery on claims arising out of the explosion of a fertilizer ship, holding that the acts charged as negligent came within the exception for discretionary functions because they were made in the planning rather than the operational stages of government activity. In this case the court of appeals applied this rule in determining that the decision to close the garbage dumps, and the measures taken to prevent contacts between bears and park visitors, were made at the planning level (Pet. App. A-10):

> Superintendent Anderson, who issued the regulations and who made the decisions of which plaintiff and Dr. Craighead complain, was making a policy judgment. Even Dr. Craighead agreed at the trial that the handling of bears is a matter of judgment and someone must apply it. Similarly, we believe that the measures taken to prevent human-bear contact at this time were discretionary, as was the decision to transplant bear No. 1792 to Gibbon Meadows, 18 miles north of the Old Faithful area.
>
> We do not believe it was the intention of Congress in enacting 28 U.S.C. §2680(a) to fasten liability upon the defendant for its handling of bears generally or sow 1792 in particular when such discretion is exercised reasonably, after investigation, consultation, and reports by qualified experts in the field.

The court of appeals did not hold, as petitioner contends (Pet. 29-31), that a failure to warn a park visitor of a known dangerous condition is within the discretionary function exception. The court of appeals noted (Pet. App. A-6 to A-10) that many precautions were taken by the Park Service after the closure of the garbage dumps and found such precautions were reasonable in light of the dangers presented.[7]

Contrary to petitioner's contention (Pet. 29-35), the principles of *Dalehite* v. *United States*, *supra*, were not overruled or weakened by the Court's later decisions in *Indian Towing Co.* v. *United States*, 350 U.S. 61, and *Rayonier, Inc.* v. *United States*, 352 U.S. 315. In *Indian Towing*, the parties agreed that the discretionary function exception was not at issue; the government's contention was simply it was not liable at all for negligent performance of "uniquely governmental functions" such as lighthouse service. 350 U.S. at 64. The Court rejected this argument but specifically held *Dalehite* inapplicable to the dispute. 350 U.S. at 69. And *Rayonier* merely held that the United States could be held liable for the negligence of Forest Service firefighters. See, *e.g.*, *Maynard* v. *United States*, 430 F. 2d 1264, 1266 n. 1 (C.A. 9) ("*Indian Towing* and *Rayonier* were not concerned with the discretionary function exception to the Act but rather with the question whether the government was immune because the acts there under consideration were performed in a uniquely governmental

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[7] This case is thus distinguishable from *Smith* v. *United States*, 546 F. 2d 872 (C.A. 10), relied on by petitioner, which held that decisions to omit warnings of known dangerous conditions do not come within the exception for discretionary functions. The court in *Smith* expressly stated that it did not find the court of appeals' decision here at odds with its own conclusion, since it recognized that decisions on bear management are policy decisions and thus within the exception. 546 F. 2d at 877, n. 5-a.

capacity"); *Eastport Steamship Corp.* v. *United States*, 372 F. 2d 1002, 1010 and n. 11 (Ct. Cl.); *Blaber* v. *United States*, 332 F. 2d 629, 631 (C.A. 2) (*Indian Towing* and *Rayonier* "did not affect the scope of the discretionary function immunity"). The cases cited by petitioner (Pet. 29, 32-37) do not question the continued vitality of the *Dalehite* holding with respect to discretionary functions.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submittted.

WADE H. MCCREE, JR.,
Solicitor General.

JUNE 1977.

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[8]For example, the Fifth Circuit in *Smith* v. *United States*, 375 F. 2d 243, 246, certiorari denied, 389 U.S. 841, while rejecting an "absolutist" view that the exception for discretionary functions would apply whenever "some decision-making power was exercised by the official whose act was questioned," nevertheless held that the exception applied in that case.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1977.

Supreme Court, U. S.
FILED
JUN 15 1977
RODAK, JR., CLERK

IN THE

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Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner's Reply to Defendant's Brief in Opposition to Petitioner's Writ of Certiorari.

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The United States' brief says there are two questions: The question (1) of contributory negligence; and the question (2) of "discretionary function."

This is not what the Court of Appeals said. The Court of Appeals said:

> "We conclude that our decision on the [discretionary exemption] issue makes unnecessary deciding the others although comment on some other questions is necessary in a full discussion of the facts." [Pet. A-2.]

Quite obviously, the respondent Government wishes to down-grade, even by-pass, the "discretionary exemp-

tion" holding of the court below. The irony is that if this Court is persuaded not to grant a hearing because of contributory negligence, an issue factually determined by the trial court in favor of petitioner, the result will be to enlarge the discretionary exemption loophole in the Federal Tort Claims Act to the point where:

> ". . . it is difficult to perceive which duties under tort law could not be avoided . . . counter to the Supreme Court's admonition that such exception to this remedial law be narrowly construed."
>
> [*Smith v. United States* (10th Cir. Dec. 27, 1976), 546 F.2d 872, 977.]

Secondly, respondent's brief states, at page 5:

> "The factual determination of contributory negligence constitutes an independent basis for the judgment below, and that determination plainly does not warrant review by this court."

It did not warrant review by the Court of Appeals. Now comes the Government and claims for the Court of Appeals the benefit of Rule 52 which it, the appellate court, should have accorded the trial court's findings. The Government thus wishes to establish, first, that the "clearly erroneous" rule should be diluted when applied to the trial court, but strengthened when applied to factual determinations made by the Court of Appeals. The policy and purpose of Rule 52 is just the opposite. This Court should not approve a holding below which permits the Court of Appeals to tinker at will with findings made at the trial level.

Thirdly, in its brief respondent Government asserts that the off-hand statements of a chambermaid should

be a substitute for warnings the Government should have given visitors [Respondent's Brief, pp. 2, 3, and 5]. The Searer quote [Respondent's Brief, p. 3] is out of context. Searer's expostulation referred to thermal features, not grizzly bears. The full quote by Vikki Searer was:

> "I told them when we were walking up to their camp that they were awfully close to the geysers and that the ground [sic] around the geysers were unstable. And I told them that they were—I told them they really would catch hell if they got camping in an unauthorized campsite. . . ."
>
> [Searer Deposition, Ex. 2, in evidence, p. 15, lines 11-15.]

Searer didn't even know there was a grizzly danger near Old Faithful. She knew, with Harry Walker, that tourists were "stupid" to mingle with the bears at the bear jams [Searer Deposition, p. 33, lines 22-25; p. 24, lines 1-19]. Was the stupidity that of the tourists, or of the Park Service?

If hearing is denied, will not this case stand for the principle that even in aggravated cases, where the Government negligently takes chances with visitor safety, avoiding its standards of due care in performance, the Government has no duty to warn and can be taken off the hook by off-hand statements by the lowest concessionaire employee. See the startling comments by the court below, quoted at page 5 of Respondent's Brief.

The Government brief refers to the campsite as "an unauthorized and isolated place to camp near the Old Faithful geyser" [Respondent's Brief, pp. 2-

3]. The Court of Appeals also refers to the camp as "unauthorized." [Pet. App. p. A-11]. Yet the Government's pamphlet, "In Grizzly Country" [Exhibit 31] and expert Dr. Frank Craighead, both hold that the best and safest camping place in grizzly country is *not* at an established campsite, *not* on a trail, but at an off-trail place like the campsite chosen by the boys. The campsite permit system was for a different purpose; it was to prevent overcrowding of campsites and to "enable the issuing ranger to know how many persons at any given time will be occupying a particular back-country campsite. . . ." [Exhibit 44, Memorandum from Chief Park Ranger to District Rangers and Specialists, Nov. 3, 1971, p. 2]. The institution of this system was to commence "by July 1, 1972," a week after Walker was killed [Exhibit 44, p. 2].

But this was not ordinarily grizzly country. This was Old Faithful. As the government, but no visitors, knew, this became grizzly country, for this short period, because the NPS program dispersed grizzlies from back-country to the visitor areas. Specifically, it was grizzly country for Harry Walker because the Park Service violated the advice of the Craighead Brothers, and of their own experts, and transplanted this particular bear, No. 1792, a distance all bear experts held to be inadequate to prevent the bear from returning. This was the bear that Harry Walker met as he walked through the forest at Old Faithful [Respondent's Brief, p. 6; Pet. App. A-10]. No bear experts supported the Government's negligent handling of this particular

bear. It is respectfully submitted that to allow the Court of Appeals' decision below to stand would be a blow to the usefulness of the Federal Tort Claims Act.

Conclusion.

It is prayed that the Writ of Certiorari issue.

Respectfully submitted,

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